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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-301

GEORGE W. LEWIS, *et al.*,
Petitioners,

—v.—

WILLIAM F. HYLAND, *et al.*,
Respondents.

APPENDIX TO PETITION FOR CERTIORARI

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH 25, 1977

George W. LEWIS et al., Appellants

in No. 76-1456,

v.

William F. HYLAND, Individually and in his official capacity as Attorney General of the State of New Jersey, et al., Appellees.

Appeal of Peter HOOK et al, in

No. 76-1457.

Nos. 76-1456, 76-1457.

United States Court of Appeals,
Third Circuit.

Argued Dec. 3, 1976.

Decided March 25, 1977.

As Amended April 19, 1977.

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Before ROSENN, FORMAN and GARTH, Circuit Judges.

OPINION OF THE COURT

GARTH, Circuit Judge.

Plaintiffs, representatives of discrete classes of travelers upon New Jersey roads, come before us for a fourth time in their laborious efforts to secure injunctive relief against the New Jersey State Police for alleged violations of Fourth Amendment and other rights.

When this case initially was before us, we determined that the complaint set forth facts which, if proved, would justify a federal equitable remedy. *Lewis v. Kugler*, 446 F. 2d 1343 (3d Cir. 1971), *rev'g in part* 324 F. Supp. 1220 (D.N.J.). Plaintiffs have now substantiated (and, indeed augmented) their initial allegations. The district court's extensive findings of fact reveal what can only be described as callous indifference by the New Jersey State Police for the rights of citizens using New Jersey roads. Were it not for the Supreme Court's opinion in *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46

L. Ed. 2d 561 (1976), which was announced after the district court proceedings had been concluded,[1] our original mandate in this case, *see* 446 F. 2d at 1350, *supra*, would have required that we reverse the district court's denial of injunctive relief in light of plaintiffs' demonstration of numerous violations of their constitutional rights.

The Supreme Court, however, has recently given expression to the doctrine of federal equitable abstention as it relates to federal court intervention in local police operations. In light of *Rizzo v. Goode*, *supra*,[2] in which the Supreme Court reversed this Court's approval of an injunction against widespread police abuses in Philadelphia, we conclude that the record of law enforcement abuses as it appears in this case--dismaying as it is--will not support federal injunctive relief.

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[1] *See*, e.g., *Thorpe v. Housing Authority*, 393 U.S. 268, 281-82, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969) ("An appellate court must apply the law in effect at the time it renders its decision"). The December 22, 1975 transcript of proceedings before the district court revealed concern by counsel as to the outcome of *Goode v. Rizzo*, 506 F. 2d 542 (3d Cir. 1974) in the Supreme Court.

[2] *See also Conlisk v. Calvin*, 424 U.S. 902, 96 S. Ct. 1093, 47 L. Ed. 2d 307 (1976), *vacating & remanding* 520 F. 2d 1 (7th Cir. 1975).

I.

One measure of the tortuous procedural history of this litigation is the fact that the original complaint was filed in December 1970--long before the Supreme Court announced its decision in Rizzo v. Goode, supra, and indeed, before the opinion in Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), in which concepts of equity, comity and federalism were reviewed.

Plaintiffs here sought injunctive relief against an alleged "pattern and practice of unreasonable searches of vehicles and travelers carried on without probable cause." Claiming to represent a class of "persons who travel upon the public toll roads and highways of the State of New Jersey" and who suffer such deprivations at the hands of the state police, and also claiming to represent a subclass of "persons of highly individualized personal appearance"--"long-haired highway travelers"--suffering similar deprivations because of their distinctive appearance, plaintiffs named as defendants state officials and the membership of the State Police.[3]

Despite plaintiffs' detailing of 25 separate alleged police-citizen incidents in 17 pages of the original complaint, the

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[3] Named as defendants were New Jersey's Attorney General, its Superintendent of State Police, 14 individual New Jersey State Troppers and all other State Troopers participating in the "pattern and practice" of illegal searches of the named plaintiffs.

district court, after a hearing on plaintiffs' motion for a preliminary injuntion, granted defendants' motion to dismiss. 324 F. Supp. 1220 (D.N.J. 1971). This Court reversed in part, 446 F. 2d 1343 (3d Cir. 1971),[4] and remanded the case to the district court for further proceedings.

The gravamen of this Court's reversal and remand in 1971 was stated as follows:

> If the plaintiffs can establish that they are subjected to a deliberate pattern and practice of constitutional violations by the New Jersey State Troopers, we believe that they are entitled to appropriate injunctive relief. Persons who can establish that they are being denied their constitutional rights are entitled to relief, and it can no longer be seriously contended that an action for money damages will serve adequately to remedy unconstitutional searches and seizures.

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[4] Applying the then-recent decision in Younger v. Harris, supra, and its companion cases, the Court held that those plaintiffs against whom state criminal prosecutions were pending could not claim a right to injunctive or declaratory relief. See 446 F. 2d at 1348-49. Accordingly, the Court sustained the district court's dismissal as to 10 of the 27 named plaintiffs.

446 F. 2d at 1350 (footnotes omitted.)[5] While we there noted the difficulties inherent in providing effective injunctive relief for citizens without obstructing the law enforcement duties of the police,[6] this problem was not viewed as unsurmountable. If the facts substantiated plaintiffs' complaint, the district court was clearly expected to invoke its "very broad power"[7] to "fashion an appropriate remedy that [would] protect the constitutional rights of citizens, while preserving the integrity and efficiency of the law enforcement authorities."[8]

Pursuant to this directive, the district court held an evidentiary hearing at which 50 of plaintiffs' witnesses testified. Plaintiffs renewed their motion for a preliminary injunction; defendants once again moved to dismiss the complaint or for entry of judgment in their favor. The district court judge refused to grant either plaintiffs' or defendants' motions,

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[5] As authority for the propriety of federal injunctive relief in such circumstances, this Court placed principal reliance upon Hague v. CIO, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939), and Lankford v. Gelston, 364 F. 2d 197 (4th Cir. 1966) (en banc). These cases have recently been given a rather different reading, see Rizzo v. Goode, supra, 423 U.S. at 373-374 & n. 8, 96 S. Ct. 598; compare id. at 382, 385-86 n. 2, 96 S. Ct. 598 (Blackmun, J., dissenting).

[6] 446 F. 2d at 1351-52.

[7] Id. at 1351.

[8] Id. at 1352.

reserving decision until the defendants presented their case. Plaintiffs appealed from the district court's order of December 28, 1971 denying their motion for a preliminary injunction. The district court's denial of an interim injunction was thereafter sustained by a judgment order of this Court. Lewis v. Kugler, No. 72-1137 (3d Cir. May 8, 1973).

In the interim, the litigation encountered the first in a series of events which account for its present procedural posture. With the case ready for decision in the district court, the district court judge who had been presiding over the hearings died. The litigation was then transferred, over plaintiffs' protests, from Newark to the district court in Camden, New Jersey.[9] A pre-trial order was executed specifying that the case would be tried on the record as it then stood, supplemented by several additional witnesses for plaintiffs "whose testimonies will be representative of recent incidents of alleged misconduct by state troopers against 'long-haired travelers' on the state's highways."[10]

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[9] This transfer prompted plaintiffs to seek a writ of mandamus from this Court requiring Chief Judge Coolahan to vacate his reallocation order. Plaintiffs' petition was denied, Lewis v. United States District Court, No. 72-2147 (3d Cir. January 24, 1973).

[10] Order of September 13, 1973.

Before this order could be implemented, the district court judge in Camden, to whom the case had been reassigned, died. After reassignment to a third district court judge, the parties agreed that, save for several supplementary depositions, the case should be decided on the then-existing record. In January 1974 these depositions were taken, and the case was once again ready for decision.

This time retirement intervened. This third district court judge to whom the case was now assigned, assumed senior status. It was at this time that the case came before the district court judge whose order we now review. The parties again agreed to submit the case on the record developed to that date, save for the addition of one affidavit. On that record, and without additional or live testimony, plaintiffs again sought a temporary injunction; once again, that relief was denied. The district court then reserved decision on certification of the putative classes plaintiffs claimed to represent, indicating that the class action determination would turn on its resolution of the equitable claims.[11]

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[11] See Transcript of October 29, 1974 at 12. Class certification was denied in the Final Judgment in this case. See Order of January 14, 1976. In light of our disposition, we need not consider the propriety of the denial of class certification.

That resolution came on November 13, 1975. The district court issued an unpublished opinion cataloging 66 separate controverted highway incidents involving state troopers and citizens. Of this number, 34 involved "clear violations of Fourth and Fourteenth Amendment rights." The district court judge went on to "take judicial notice of the fact that a relatively small number of those whose rights were violated were represented before the court."

Despite the court's findings of constitutional violations by New Jersey State Troopers, injunctive relief was denied. In essence, the district court reasoned that the number of incidents of police abuse of citizens' rights, even extrapolating beyond those proved in this case, paled in comparison with the overwhelming number of routine contacts between Troopers and travlers.[12] The evidence was found to reveal no "deliberate pattern and practice" of abuse by responsible officials; rather, the fault lay in the "willful and random acts...of a minority of the Troopers."

In addition, the court found no "substantial threat" of future violations by abusive Troopers. The passage of time, a general acceptance of diverse life-styles and appearances and the threat of this litigation were all accorded a beneficial effect. In the absence of pressing need, injunctive interference in police operations was determined to be unwise.

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[12] The district court opinion observes that:

> "it would be entirely reasonable to find that there were at least 1,500,000 police contacts with automobile occupants during the three year period involved in this case."

Still, the district court felt duty-bound to follow our earlier mandate to remedy any constitutional violations. With injunctive relief held to be unavailable, the district court, apparently sua sponte, stated that it would entertain applications for money damages against those individual Troopers who had violated the constitutional rights of named plaintiffs.[13] By an order dated January 14, 1976, the court awarded damages totalling $600 against three individual Troopers.

Plaintiffs appeal from that portion of the court's final judgment which denied injunctive relief. They also appeal from the court's refusal to permit them to add additional named defendants against whom they desired an award of money damages. They also contest the sufficiency of damages awarded.

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[13] As discussed in Part III infra, the court's invitation appears to be the first and only indication that compensatory money damages were embraced or contemplated as a part of the remedy sought by plaintiffs.

Defendants appeal from the court's award of damages and its denial of a jury trial on that issue.

II.

As we have previously noted, plaintiffs' demand for injunctive relief encounters a roadblock of formidable dimensions in Rizzo v. Goode, supra. In Rizzo, plaintiffs represented two classes of Philadelphia citizens ("minorities," and citizens generally). They complained of repeated violations of Fourth and Fourteenth Amendment rights by the Philadelphia police--in particular, by two named officers. A total of 28 alleged incidents were before the district court, at least 16 of which involved police violations of citizens' constitutional rights. Plaintiffs there sought injunctive relief, just as they do here.

Like the instant case, the district court in Rizzo found that the incidents, despite their limited number, were neither rare nor isolated; unlike this case, however, the district court in Rizzo granted plaintiffs their requested injunctive relief. C.O.P.P.A.R. v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973). Defendants were directed "to submit to [the District] Court for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct." Id. at 1322.

The Rizzo result was a modified complaint procedure, set forth in "an all-encompassing 14-page document,"[14] which followed the district court's suggested guidelines.[15] On appeal, this Court affirmed, stressing the "limited and moderate" nature of the relief granted. *Goode v. Rizzo*, 506 F. 2d 542, 547-48 (3d Cir. 1974).

The Supreme Court did not agree. By a 5-3 decision, the judgment of this Court was reversed. *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d. 561 (1976). Although some have read Mr.

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[14] 423 U.S. at 365 n. 2, 96 S. Ct. at 601.

[15] These guidelines called for:
(1) Appropriate revision of police manuals and rules of procedure spelling out in some detail, in simple language, the "dos and don'ts" of permissible conduct in dealing with civilians (for example, manifestations of racial bias, derogatory remarks, offensive language, etc.; unnecessary damage to property and other unreasonable conduct in executing search warrants; limitations on pursuit of persons charged only with summary offenses; recording and processing civilian complaints, etc.); (2) Revision of procedures for processing complaints against police, including (a) ready availability of forms for use by civilians in lodging complaints against police officers; (b) a screening procedure for eliminating frivolous complaints;

(FN 15 Continued on Next Page)

Justice Rehnquist's majority opinion in *Rizzo* as the harbinger of a "nullification" of the Fourteenth Amendment,[16] and while the case undoubtedly represents an extension of the doctrine of *Younger v. Harris*, *supra*, insofar as federal intervention in state police practices is concerned,[17] we decline to give *Rizzo* such a broad reading. Nonetheless, because we find the instant case to be controlled by *Rizzo* with respect to the proved constitutional violations and the proposed injunctive remedy, the narrow holding in *Rizzo* must govern the result here.

(FN 15 Continued)

(c) prompt and adequate investigation of complaints; (d) adjudication of non-frivolous complaints by an impartial individual or body, insulated so far as practicable from chain of command pressures, with a fair opportunity afforded the complainant to present his complaint, and to the police officer to present his defense; and (3) prompt notification to the concerned parties, informing them of the outcome.
357 F. Supp. at 1321.

[16] Note, *Rizzo v. Goode: The Burger Court's Continuing Assault on Federal Jurisdiction*, 30 Rutgers L. Rev. 103,148-51 (1976).

[17] For other discussions of the *Rizzo* decision, see Note, *Rethinking Federal Injunctive Relief Against Police Abuse: Picking Up the Pieces After Rizzo v.*

(FN 17 Continued on Next Page)

Although Rizzo discusses "standing" and "federalism", i.e., Younger v. Harris, the gravamen of Rizzo is to be found in its analysis of the district court's "unprecedented theory of §1983 liability." 423 U.S. 373-77, 96 S. Ct. 598.

Rizzo's §1983 discussion, like its "standing" discussion, was aimed at the failure of plaintiffs to prove the existance of an unconstitutional policy or plan adopted and enforced by the official defendants. Throughout, the Court emphasized the complete absence of any causal link between the individual police officers' conduct and the responsible authorities. Mere invocation of the words "pattern" or "plan" did not suffice without this causal link. Nor was it sufficient in Rizzo to have proved 16 to 20 incidents "of constitutional dimension" where the number of police-citizen contacts was many times greater.

Rizzo's focus was on the absence of any evidence (beyond what was dismissed as "[t]he District Court's unadorned finding of a statistical pattern") of participation by the named defendants in a plan or scheme to suppress constitutional rights. Such a plan, once proved, could be enjoined in federal court. Allee v. Medrano, 416 U.S. 802, 815-16, 94 S. Ct. 2191, 40 L. Ed. 2d 566 (1974); Hague v. CIO, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939); Lankford v. Gelston, 364 F. 2d 197, 202 (4th Cir. 1966) (en banc) (enjoining the "effectuation of a plan conceived by high ranking [police] officials").

(FN 17 Continued) Goode, 7 Rutgers-Camden L.J. 530 (1976); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 238 (1976).

The Rizzo Court refused to infer the existence of a plan of concerted action from the facts before it. A mere "failure to act [by responsible authorities] in the face of a statistical pattern[18] was found to provide no basis for injunctive relief.

This discussion and holding did not go uncriticized. Mr. Justice Blackmun, dissenting in Rizzo, challenged the majority's narrowing of §1983:

> The Court today appears to assert that a state official is not subject to the strictures of 42 U.S.C. §1983 unless he directs the deprivation of constitutional rights.

Ante, [423 U.S.] at 375-377 [, 96 S. Ct. at 606-607.] In so holding, it seems to me, the Court ignores both the language of §1983 and the case law interpreting the language. Section 1983 provides a cause of action where a person acting under color of state law "subjects, or causes to be subjected," any other person to a deprivation of rights secured by the Constitution and laws of the United States. By its very words, §1983 reaches not only the acts of an official, but also the acts of subordinates for whom he is responsible. In Monroe v. Pape, 365 U.S. 167 [, 81 S. Ct. 473, 5 L. Ed. 2d 492] (1961), the Court said that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," id., at 187, [81 S. Ct. at 484,] and that:

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[18] 423 U.S. at 376, 96 S. Ct. at 606.

> "It is abundently clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." Id., at 180 [, 81 S. Ct. at 480.] (Emphasis in original.)

423 U.S. at 385, 96 S. Ct. at 610.[19]

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[19] Justice Blackmun continued:

> I do not find it necessary to reach the question under what circumstances failure to supervise will justify an award of money damages, or whether an injunction is authorized where the superior has no consciousness of the wrongs being perpetrated by his subordinates. It is clear that an official may be enjoined from consciously permitting his subordinates, in the course of their duties, to violate the constitutional

(FN Continued on Next Page)

Our earlier remand in the instant case, Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971), clearly was in harmony with Justice Blackmun's statements.[20] Plaintiffs' proofs here are responsive to our directive in Lewis v. Kugler, but, as Justice Blackmun's dissent in Rizzo reveals, the Rizzo Court has changed the operative standards.

Justice Rehnquist, writing for the majority in Rizzo, limited federal intervention into state police practices to those instances where it could be found that a pervasive pattern or policy of

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(FN 19 continued)

> rights of persons with whom they deal. In rejecting the concept that the official may be responsible under § 1983, the Court today casts aside reasoned conclusions to the contrary reached by the Courts of Appeals of 10 circuits.

Id. at 385, 96 S.Ct. at 611 (footnotes omitted).

[20] In Lewis v. Kugler, this Court stated that a § 1983 injunctive remedy would become appropriate:

> should the plaintiffs establish that a substantial threat of constitutional violations exists, either directed by or tolerated by officials of the New Jersey State Troopers or the State of New Jersey.

446 F.2d at 1351.

unconstitutional behavior was causally related to the named official defendants. He distinguished between this situation and one where only an unacceptably high number of incidents was proved, without the essential causal connection to the officials in charge. That distinction is best revealed by his discussion of § 1983 in this context:

> In *Hague* [*v. CIO, supra*,] the pattern of police misconduct upon which liability and injunctive relief were grounded was the adoption and enforcement of deliberate policies by the defendants there (including the Mayor and the Chief of Police) of excluding and removing the plaintiff's labor organizers and forbidding peaceful communication of their views to the citizens of Jersey City. These policies were implemented "by force and violence" on the part of individual policemen. There was no mistaking that the defendants proposed to continue their unconstitutional policies against the members of this discrete group.
>
> Likewise, in *Allee v. Medrano*, 416 U.S. 802 [, *94 S.Ct. 2191*, 40 L.Ed.2d 566] (1974), relied upon by the Court of Appeals and respondents here, we noted that
>
> > "[t]he complaint charged that the enjoined conduct was but one part of a *single plan* by the defendants, and the District Court found a *pervasive pattern of intimidation* in which the law enforcement authorities sought to suppress appellees' constitutional rights. In this blunderbuss effort the police not only relied on statutes . . . found constitutionally deficient, but concurrently exercised their authority under valid laws in an unconstitutional manner." Id., at 812 [, 94 S.Ct., at *2198*] (emphasis added).
>
> The numerous incidents of misconduct on the part of the *named* Texas Rangers, as found by the *District* Court and summarized in this Court's opinion, established beyond peradventure not only a "persistent pattern" but one which flowed from an intentional, concerted, and indeed conspiratorial effort to deprive the organizers of their First Amendment rights and place them in fear of coming back. *Id.*, 814-815 [, 94 S.Ct. 2199-2200.]
>
> Respondents stress that the District Court not only found an "unacceptably high" number of incidents but held, as did the Court of Appeals, that "when a *pattern* of frequent police violations is shown, the law is clear that injunctive relief may be granted." 357 F. Supp., at 1318 (emphasis added). However, there was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists else-

where; indeed, the District Court found "that the problems disclosed by the record . . . are fairly typical of [those] afflicting police departments in major urban areas." Ibid. Thus, invocation of the word "pattern" in a case where, unlike Hague and Medrano, the defendants are not causally linked to it, is but a distant echo of the findings in those cases. The focus in Hague and Medrano was not simply on the number of violations which occurred but on the common thread running through them: a "pervasive pattern of intimidation" flowing from a deliberate plan by the named defendants to crush the nascent labor organizations. Medrano, at 812 [, 94 S.Ct. at 2198.] The District Court's unadorned finding of a statistical pattern is quite dissimilar to the factual settings of these two cases.

The theory of liability underlying the District Court's opinion, and urged upon us by respondents, is that even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners' failure to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in Hague and Medrano. Respondents posit a constitutional "duty" on the part of petitioners (and a corresponding "right" of the citizens of Philadelphia) to "eliminate" future police misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered

to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions, and we decline to do so now.

423 U.S. at 374-76, 96 S.Ct. at 605-606.

As in Rizzo, the district court here made no finding relating the unconstitutional acts to the acts of the official defendants. To the contrary, the finding made by the district court--a finding which has adequate and reasonable support in the record, see Government of Virgin Islands v. Gereau, 523 F.2d 140, 144-46 & n. 14 (3d Cir. 1975), cert. denied, 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323 (1976)--is:

> there was no deliberate pattern and practice of violating Fourth and Fourteenth Amendment rights on the part of the Attorney General, the Superintendent, or the New Jersey State Police as a whole. Those instances of illegality were no more than willful and random acts on the part of a minority of the Troopers.

This finding was made after proof of

66 incidents, 34 of which were found to involve Fourth and Fourteenth Amendment violations. Before Rizzo, this number of violations might have been deemed sufficient to establish a statistical pattern, warranting relief by the district court. However, the now-required additional element of a "causal relation to responsible authorities" is fatal to the relief sought where proof of such a relationship is wanting.

Plaintiffs' evidence here demonstrated at most an unfortunate insensitivity on the part of responsible officials toward reports of abuses by individual Troopers.[21] The department's apparent obliviousness to citizens' complaints[22] reinforces an

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[21] This insensitivity extended in several instances to departmental awards being conferred upon individual Troopers, named as defendants here, for their performance during the very time in which they instituted flagrantly illegal searches.

[22] Counsel for appellees assured us at oral argument that departmental disciplinary steps against some of the named Troopers would be taken after resolution of this lawsuit. With the "obstruction" of this lawsuit removed, we trust that these departmental disciplinary actions will quickly be initiated.

impression of official indifference. Beyond these factors, however, and aside from the statistical number of incidents proved, there is no evidence of a causal link between, on the one hand, either the State Police hierarchy or any department-wide directive, and, on the other, the constitutional violations.

Indeed, any link between responsible officials and the incidents of abuse is necessarily more attenuated here than in Rizzo. Since the institution of this suit, the State of New Jersey, has appointed a new Attorney General, and the State has had three different Superintendents of Police. Plaintiffs' attempt to bridge this gap by affidavit[23] cannot mask the significance of these changes for Rizzo purposes. Where none of the incidents proved to the district court's satisfaction occurred under the regimes of the incumbent "responsible authorities"--the Attorney General and Superintendent of Police--we cannot find the concerted conduct against which large-scale injunctive relief might be directed.

The district court's findings of random acts on the part of a minority of Troopers, as well as its finding of "no deliberate pattern and practice" on the part of New Jersey officials, bring this case wholly within the doctrine of Rizzo for purposes of determining the propriety of injunctive relief. When we consider these findings, together with the circumstance that none of the charged and proved violations occurred under the regimes of the present responsible New Jersey authorities, it is evident that the district court was correct in denying injunctive relief, *Rizzo*, *supra* 423 U.S. at 377, 96 S.Ct. 598, and therefore must be affirmed in this respect.[24]

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[23] See Affidavit of Morton Wolfson, October 16, 1974.

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[24] *Rizzo* itself says nothing concerning the propriety of injunctive relief against the individual Troopers in this case. However a review of the proceedings including the district court's findings that there existed no "substantial threat" of future violations by these Troopers, satisfies us that the district court judge did not abuse his discretion in denying an injunction against individual Troopers. That finding, combined with the difficulty of framing an injunction specific enough to be enforced, yet flexible enough to allow Troopers to respond with dispatch and certainty to the exigencies of their often-dangerous jobs, leads us to the same conclusion as that reached by the district court: that individual injunctions would be inappropriate on this record. The district court judge aptly observed in colloquy with counsel that it would hardly be appropriate "if every-

(FN 24 continued on next page)

III.

Although the district court judge refused to grant plaintiffs their requested injunctive relief--correctly, as our discussion above concludes--he went

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(FN 24 continued)

time someone were stopped on the New Jersey Turnpike and had his car searched by a State Police Officer, or himself searched, he could gallop in here and seek to hold the officer in contempt." Transcript of Hearing of October 29, 1974, at 6. As counsel for plaintiffs responded, an order granting such injunctive relief "would create great difficulties for the Court." *Id.* Counsel for plaintiffs were similarly hard pressed at oral argument before this Court, to suggest the manner in which such an injunction could be framed against individual Troopers.

Our agreement with the district court's refusal to grant individual injunctions should not be taken to mean that such relief could never be granted. The district court, after stating in its opinion that individual injunctive relief "would be inappropriate at this time," went on to say:

> This does not mean, however, that the court would hesitate to shape such relief if future misconduct on the part of the named defendants is brought to its attention.

on to invite those named plaintiffs who had suffered constitutional deprivations at the hands of named Troopers to submit claims for compensatory damages. A consideration of this issue requires that we put the question of damages in its proper perspective.

The initial complaint filed by plaintiffs expressly sought only declaratory and injunctive relief. Paragraph I of that complaint refers only to " . . . an action seeking declaratory and injunctive relief." Part VI of the complaint, the prayer for relief, in Paragraph 1 seeks a declaratory judgment; in Paragraph 2, a preliminary and prohibitory injunction; in Paragraph 3, a preliminary and mandatory injunction; and in Paragraph 4, a preliminary and permanent injunction prohibiting prosecutions. Paragraph 5 asks the court to retain jurisdiction, and Paragraph 6, the final paragraph, requests "that the court issue any further relief that it deems just and reasonable."

The answer of the defendants included as an affirmative defense the doctrine of unclean hands, which doctrine, if established, would preclude equitable relief. None of the proceedings or subsequent pleadings ever adverted to or addressed the damage issue or legal damages. Rather, the overall nature of the proceeding was at all times recognized by the parties, by the various

district court judges, and by this Court, as strictly equitable in character.

After this Court's remand in Lewis v. Kugler, supra, plaintiffs amended their complaint, but that amendment did not alter the essential equitable character of the proceedings. Therefore, the stipulations into which the parties entered permitted the case to be heard on the record as developed during the preceding years. During all of this time, the plaintiffs never asserted that they were seeking legal damages. The primary thrust of, and indeed the only relief sought by the plaintiffs was the issuance of injunctions against the practices of the State Troopers.

It was in this setting that the district court rendered its opinion of November 13, 1975, which held that injunctive relief was unavailable and which for the first time indicated that money damages could be obtained against individual Troopers. It is immaterial whether this issue surfaced because the district court judge sensed the inequity of sending plaintiffs away empty handed despite their proof of unconstitutional searches, or because he misconceived the remedies required by Lewis v. Kugler.[25] What is material is

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[25] The award of damages was said to be responsive to our earlier remand in Lewis v. Kugler, supra. While we sympathize

(FN 25 continued on next page)

that just before closing its opinion the district court stated:

> The question of money damages remains. Such damages are appropriate in actions brought under 42 U.S.C. § 1983. Fisher v. Volz, 496 F.2d 333, 346-347 (3d Cir. 1974). Those named plaintiffs whose Fourth Amendment rights were violated may apply to the court within 30 days of the date of this opinion for a hearing date for assessment of money damages. Such damages will be awarded where legally possible.

While we recognize the general availability of damages in a § 1983 action where damages have been sought and have been in issue between the parties,[26] we

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(FN 25 continued)

with the district court's desire to afford plaintiffs some remedy in lieu of equitable relief, nothing in our earlier remand can be read to require an award of damages. Indeed, the authority which the district court relied upon (footnote 17, 446 F.2d at 1351) speaks only in terms of a remedial order. Moreover, this observation in our opinion followed a discussion, which negated the effectiveness of a damages remedy for police misconduct. See id. at 1350.

[26] See Curtis v. Loether, 415 U.S. 189,

(FN 26 continued on next page)

have great difficulty in countenancing the district court's decision to award damages in the manner in which it did, after the case was, for all intents and purposes, at a close.

First, substantiating our belief that no damages had ever been contemplated by the parties, it is significant to us that the plaintiffs themselves recognized that an amendment to their complaint would be required to crystallize the money damages issue and to support a money damages award. Accordingly, on December 16, 1975, just weeks after the district court's opinion was announced, the plaintiffs sought to amend their complaint to provide for compensatory and punitive damages.

The defendants, on the other hand, apparently not having contemplated other than equitable defenses, thereupon sought a jury trial for those defendants against whom damages claims were to be asserted. This in turn led to additional motions: the plaintiffs sought to amend their complaint to designate additional party-defendants; the defendants, on the other hand, sought to raise still other defenses.

(FN 26 continued)

194-96, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974); Ford v. Breier, 71 F.R.D. 195, 197 (E.D. Wis. 1976).

On December 29, 1975, the district court judge filed his memorandum opinion in which he assessed a total of $600 damages for reasonable compensation.[27] Thereafter, on January 14, 1976, a final order was entered in this case, which, among other provisions, denied the defendants a jury trial, denied plaintiffs their amendments to the complaint, and reflected the damage awards which we have recited. As earlier indicated, it was from that order that this appeal was taken.

Any fair reading of the protracted proceedings in this case must lead to the following conclusions:

(1) that the plaintiffs at no time until after the November 1975 opinion denying injunctive relief ever intended to seek legal damages;

(2) that throughout these proceedings the defendants never contemplated the possibility of money damages being awarded against them;

(3) that, had damages been contemplated, appropriate pleadings and proceedings, including discovery, would have been utilized;

(4) that, with damages as a possibility, a jury demand would probably have been made prior to the district court's opinion by one, if not both, parties;

(5) that the parties were content to try the case as an action for equitable relief; and

(6) that it was not until the district court judge injected the question of damages into the case that this issue entered into the thinking of the parties.

In such circumstances, and particularly in light of the seven-year history of this litigation, we are not about to interpret the catch-all phrase "and such other relief . . ." to include a claim for legal damages. Cf. Crane Co.v. American Standard, Inc., 490 F.2d 332, 341-83 (2d Cir. 1973).[28] While we do concede

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[27] Plaintiff Stuart Ball was awarded $100 against Trooper Peter Hook; plaintiff Jeffrey Fogel was awarded $100 against Trooper Hook; plaintiff George Lewis was awarded $150 against Trooper John Tanner; and plaintiff Jesse Berman was awarded $250 against Trooper Russell Hawke.

[28] In Crane, the Court of Appeals for the Second Circuit concluded that the right to a jury trial was abrogated when a suit for purely equitable relief against a merger was transformed into a suit for damages by the merger's consummation. That case, of course, involved federal securities law, rather than § 1983. Moreover, its result rests upon changed

(FN 28 continued on next page)

that in many circumstances that phrase may be so read, we decline to give it that content here.

We also decline to consider the damages awarded as incidental to equitable relief. Indeed, we note that in Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), a case involving Section 812 of the Civil Rights Act of 1968 (42 U.S.C. § 3612), the Supreme Court said:

> if [a] legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought.

415 U.S. at 196 n.11, 94 S.Ct. at 1009, citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-73, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). In any event, the equitable relief sought by the plaintiffs has not been afforded here.

(FN 28 continued)

factual circumstances not present here. (Plaintiffs here certainly were free to seek legal as well as equitable damages in framing their initial complaint.)

This leaves as a last alternative the possibility of returning the case to the district court for jury proceedings in connection with the plaintiffs' claims. In normal course, this might well have been the direction which we would take. However, as we earlier emphasized, this case was never started or structured as a § 1983 damage action. As the district court judge said in United States v. Pelzer Realty Co., 377 F. Supp. 121, 123 (M.D. Ala. 1974), aff'd per curiam, 537 F.2d 841 (5th Cir. 1976):

> While damages, even nominal damages are proper relief for a violation of the [Civil Rights Act of 1968], in the opinion of this Court, an award of damages, where none were prayed for or specifically proved and when the plaintiffs gave the Defendants no hint that damages were to be litigated so that the Defendants might litigate the issue or consider demanding a jury, would be a strange twist of the law in order to accommodate the Plaintiff.

A remand for a jury trial within the framework of the instant case would in our mind torture this entire litigation into a proceeding vastly different than either party had ever intended or contemplated. Such a remand would also require that additional proceedings take place after final disposition of those issues which had legitimately been litigated, which had been considered by the various district court judges and by this Court, and which had been ultimately resolved on a stipulated record. While we obviously have no objection to any independent proceeding which may have been or which still may be brought by a plaintiff to vindicate his constitutional rights (by an award of damages) we do not believe that the instant proceeding is the appropriate vehicle by which to achieve that purpose.[29] Accordingly, we are of the view that the district court's eleventh-hour introduction of the money damages issue in its disposition of the relevant issues in this case exceeded its permissible discretion.

IV.

Having given careful consideration to the various other contentions on appeal of the parties, and having concluded that they are without merit, we will affirm the district court's order of January 14, 1976 in all respects except its award of damages. For the reasons

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[29] We again note the fact that the district court judge who awarded damages was the fourth district court judge assigned to this case and that by reason of the stipulated record, at no time had the benefit of having the plaintiffs and the defendants testify before him. While we do not hold that this factor precludes an award of damages in an appropriate case, we cannot ignore it here.

which we have specified in Part III of this opinion, we will direct that, in this latter respect, so much of the district court's order as awarded damages to plaintiffs Ball, Fogel, Berman, and Lewis and against Troopers Hook, Hawke and Tanner be vacated.

V.

So that our holding is not misunderstood, we emphasize that we have not held that an injunction against police abuses will never lie. Nor have we held that damages against police officers are unavailable under § 1983.

What we hold here is that in this case, absent proof of affirmative involvement in a pattern and practice of constitutional violations by supervisory officials, injunctive relief may not issue against them. We also hold that, on this record, an injunction would be inappropriate as to the named Troopers. Further, given this record and the manner in which this case was structured by the pleadings, damages that were never sought by the plaintiffs prior to the district court's dispositive opinion of November 13, 1975 may not be awarded.

VI.

Having affirmed in part and reversed in part, we will remand to the district court for the entry of an appropriate order consistent with this opinion.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH 25, 1977

GEORGE W. LEWIS, et al.,)
)
vs.) No. 76-1456
)
WILLIAM F. HYLAND, et al.,) USCA 3d Cir.

On Appeal From the Judgment of
the United States District Court
for the District of New Jersey

(D.C. Civil No. 1712-70)

Present: ROSENN, FORMAN and GARTH,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on December 3, 1976.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed January 14, 1976, be, and the same is hereby affirmed in all respects except as to its award of damages. The said judgment is hereby reversed insofar

as it awarded damages to plaintiffs Bell, Fogel, Berman and Lewis and against Troopers Hooke, Hawke and Tanner. The cause is remanded to the district court for entry of an appropriate order consistent with the opinion of this Court.

ATTEST:

M. Elizabeth Ferguson

Chief Deputy Clerk

March 25, 1977

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, NOVEMBER 13, 1975

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 1712-70

GEORGE W. LEWIS, et al, :

Plaintiffs, :

v. : **OPINION**

GEORGE F. KUGLER, JR., :
etc., et al,
:
Defendants.
:

This action has been brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964). There are 37 named plaintiffs who seek to represent a class of individuals. The defendants are the Attorney General of the State of New Jersey, the Superintendent of State Police, 14 named individual State Troopers, and a class of unnamed State Troopers. This action has not, as yet, been certified as a class action. F.R. Civ.P. 23.[1]

The details of this suit are adequately set forth in the prior published opinions of the District Court and the Third Circuit, and they will not be repeated here. Lewis v. Kugler, 324 F. Supp. 1220 (D.N.J. 1971), vacated 446 F.2d 1343 (3d Cir. 1971). Basically, the plaintiffs allege a pattern and practice of conduct by defendants to deprive the plaintiffs and their proposed class of their rights under the Fourth and Fourteenth Amendments to the United States Constitution. Specifically, the plaintiffs allege a program to stop and illegally search "longhaired travellers" on the basis of their "highly individualized personal appearance."

The complaint was filed in December 1970. The action was dismissed, but the Third Circuit reversed and remanded. Lewis v. Kugler, supra. The late Robert Shaw, U.S. D.J., held a complete trial and reserved decision. Judge Shaw died before rendering an opinion. The case was then submitted to the late John J. Kitchen, U.S.D.J., on the existing record. Judge Kitchen also died before rendering a decision. The case has now been submitted to me for decision on the trial record compiled before Judge Shaw as well as some supplemental depositions and affidavits.[2]

The findings of fact and conclusions of law as to the 66 incidents which were submitted to the court are contained in the Appendix to this opinion. In a bare majority of the incidents, the court has found that the conduct of the state troopers was illegal in that the searches were in violation of the Fourth and Fourteenth Amendment rights of the individual plaintiffs involved.

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[1] In light of the decision entered today, the question of certification is moot.

[2] I am happy to report my survival for a sufficient length of time to file this opinion.

The Fourth and Fourteenth Amendments require that any search or seizure be based on a search warrant issued upon probable cause. There are, however, a number of exceptions to this general principle. Some of these exceptions are predicated on the mobility of the automobile.

Perhaps the major exception to the warrant requirement is the search by consent. In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Supreme Court explored the question of consent at some length. The court rejected the assertion that the officer should inform the person he seeks to search that he has a right to refuse:

> * * * We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. * * * (Footnote omitted.) (Emphases added.) 412 U.S. at 248-249.

The determination of voluntariness must be made after an examination of the totality of the circumstances. Many of the illegal searches involved coerced consent or absence of consent.[3]

A second exception is found in the landmark opinion of Carroll v. United States, 267 U.S. 132 (1925). That case holds that a police officer may search a readily movable vehicle if he has probable cause to believe that it contains contraband or illegally possessed goods. In such cases, the mobility of the vehicle is an exigent circumstance which allows a search without a warrant. However, there can be no doubt that probable cause is still required in such cases.

Where the police officer has probable cause to search a vehicle under circumstances which do not require a warrant, he may wait for a convenient time and place to make the search. Chambers v. Maroney, 399 U.S. 42 (1970), rehearing denied 400 U.S. 856 (1970). Thus, in Chambers, the court held that it was not unreasonable for a police officer to move an arrestee's car to the police station for a search when he could have searched it at the site of the arrest. There was no need to obtain a warrant despite the fact that the exigent circumstances were obviated by the arrest and removal of the defendant and the car to police headquarters.

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[3] The New Jersey Supreme Court recently held that the State must establish knowledge of the right to refuse under the State Constitution. State v. Johnson, ___N.J.___ (1975). That decision is prospective in effect.

Another exception is the inventory search of an impounded automobile. Cooper v. California, 386 U.S. 58 (1967), rehearing denied. [sic] 386 U.S. 988 (1967). However, there must actually be impoundment for such a search to be valid. Where a defendant's car is kept at the police station for his convenience, pending his release or the automobile's removal by a friend or relative, an inventory search is not permitted. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968). Thus, the right to search for inventory purposes depends on the relationship of the vehicle to the offense involved and the nature of the custody into which the automobile has been taken.

A limited search without a warrant may take place incident to a lawful arrest. Chimel v. California, 395 U.S. 752 (1969), rehearing denied 396 U.S. 869 (1969). Thus, incident to a valid arrest, a police officer may search the subject and the area immediately surrounding him. This search is

limited to two purposes. First, the officer may look for and seize any weapon on the defendant's person or within his reach.[4] Second, the officer may ascertain whether there is evidence which the subject could readily destroy if it were not seized.

Reasonableness is the touchstone of the limited Chimel type search. While a search immediately preceding an arrest is incident thereto if probable cause for the arrest existed prior to the search,[5] it is clear that a search too remote in time or place may not be incident to the arrest. Thus, where a search is delayed a few minutes, but both the car and the arrestee remain near the scene of the arrest, a search of the car has been upheld. Adams v. Williams, 407 U.S. 143 (1972). On the other hand, the Supreme Court has held that a search of a car soon after the occupants were booked for vagrancy and the car had been towed to a garage was too remote in time and place. Preston v. United States, 376 U.S. 364 (1964). In any event, the reasonableness of such a search under the Chimel decision is a question of fact that depends on the totality of the circumstances.

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[4] See also Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973).

[5] United States v. Murray, 492 F.2d 178 (9th Cir. 1973), cert. denied 419 U.S. 854 (1974); State v. Gosser, 50 N.J. 438, 236 A.2d 377 (1967), cert. denied 390 U.S. 1035 (1968).

There is also the "plain view" seizure. This exception does not involve a search, but is premised on an officer's seizure of something which is in his "plain view." The officer must legally be in a position to see the thing seized. Harris v. United States, 390 U.S. 234 (1968).

Finally, there is a limited right to "stop and frisk" any individual. Although a full search must be incident to a valid arrest, a police officer enjoys a limited right to "stop and frisk." When a police officer has neither a warrant nor probable cause, he may "stop" an individual if his on the spot observation indicates to him that specific and articulable facts and the reasonable inferences therefrom warrant approaching a person for the purposes of investigating possible criminal behavior. If the officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, he may "frisk" for weapons only. Terry v. Ohio, 392 U.S. 1 (1968).

The court in Terry outlined the degree of certainty required for such a limited search as follows:

> * * * The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. (Citations and footnote omitted.) And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch', but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. (Citation omitted.) 392 U.S. at 27.

Under such circumstances, the court held that the officer might make a search which is confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments usable in an assault upon the police officer. The approved procedure involves an initial frisk of the surface of the individual's clothing, followed by further invasions into the garments where something is felt which might be a weapon. Terry, supra, at 30-31.

Something should be said concerning probable cause. It is well established that a "furtive movement" in and of itself is not sufficient to give rise to probable cause. It is a factor to be considered along with other facts and inferences. See Sibron v. State of New York, 392 U.S. 40 (1968); United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969); United States ex rel. McArthur v. Rundle, 402 F.2d 701 (3d Cir. 1968); United States v. Day, 331 F. Supp. 254 (E.D. Pa. 1971), affirmed 455 F.2d 454 (3d Cir. 1972). Several of the incidents presented here involved the "furtive movement" question.

A mere traffic violation in and of itself does not give rise to probable cause. Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968); State v. Scanlon, 84 N.J. Super. 427 (App. Div. 1964). Thus, a search incident to the issuance of a summons would seem inappropriate. See Rules Governing The Courts Of New Jersey, R. 3:3-1. If, however, the offense involved the use of an instrumentality,[6] a search for such instrumentality would be appropriate. See United States v. Smith, 340 F. Supp. 1023 (D. Conn. 1972); State v. Cusick, 110 N.J. Super. 149 (App. Div. 1970), appeal after remand 116 N.J. Super. 482 (App. Div. 1971); Annotation, Lawfulness of search of motor vehicle following arrest for traffic violation, 10 A.L.R.3d 314 (1966). An officer may also search for a vehicle registration which has not been produced. United States v. Brown, 470 F.2d 1120 (9th Cir. 1972); State v. Boykins, 50 N.J. 73, 77 (1967); N.J.S.A. 39:3-29.

After applying the legal principles enunciated above to the facts established in this case, it is obvious that some of the New Jersey State Troopers have violated the precepts of the Fourth and Fourteenth Amendments. Searches took place where there was neither consent nor probable cause to search with or without a warrant. Many of these incidents involved searches which were not even arguably valid. Such patent violations of the constitutional rights can not be tolerated in a free society such as ours.

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[6] E.g. a drug or alcoholic beverage.

However, in order to be entitled to the type of injunctive relief which is requested here, the plaintiffs must show that there is a deliberate pattern and practice of constitutional violations by the named officials and the State Troopers. Lewis v. Kugler, supra, 446 F.2d at 1350. The number of incidents necessary to show a pattern and practice depends upon the nature of the right protected and the nature and number of the violations of such right. United States v. Mintzes, 304 F. Supp. 1305, 1313-1314 (D. Md. 1969).

The Fourth and Fourteenth Amendment rights involved here are among the most fundamental guaranteed by our constitution.[7] The nature of the violations proved must now be determined. Determination of the existence of a pattern and practice is more than a question of numbers. United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971); United States v. Ramsey, 331 F.2d 824, 837 (5th Cir. 1964) (concurring opinion); United States v. Mintzes, supra.

Of the 66 incidents presented to the court, 35 have been found to involve clear violations of Fourth and Fourteenth Amendment rights. The court will take judicial notice of the fact that a relatively small number of those whose rights were violated were represented before the court.

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[7] As plaintiffs note, there might also be a violation of the right to travel. Shapiro v. Thompson, 394 U.S. 618 (1969).

However, the court finds that, during the calendar year 1970 alone, over 247,000,000 automobile trips were made on the New Jersey Turnpike and the Garden State Parkway. These are the two principal roadways patrolled by the State Police, but not the only ones involved in this case. Approximately 275,000 summonses were issued.[8] Three thousand three hundred fifty one persons were arrested for narcotics laws violations.[9] It would appear that there were approximately 545,000 instances in which summonses or warnings were issued, vehicles other than trucks were inspected, or possible drunk drivers were checked. Extrapolating from these figures, which involve only one year, it would be entirely reasonable to find that there were at least 1,500,000 police contacts with automobile occupants during the three year period involved in this case.

The court finds that there was no deliberate pattern and practice of violating Fourth and Fourteenth Amendment rights on the part of the Attorney General, the Superintendent, or the New Jersey State Police as a whole. Those instances of illegality were no more than willful and random acts on the part of a minority of the Troopers.

The responsible State officials have categorically denied that there was a pattern and practice. This testimony was entirely credible. There was also evidence that the Troopers were trained in search and seizure

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[8] Defendants' Exhibit 20.

[9] Defendants' Exhibit 22.

law at their initial training sessions and during yearly refresher courses. There is also a Law Enforcement Code of Ethics which explicitly directs that the Troopers should not act officiously or permit their personal feelings, prejudices, animosities, or friendships to influence their decisions. In light of such clear expressions of official policy, it would seem unlikely that there was tacit approval of misconduct by the responsible officials.

The court would exhort the New Jersey State Police to reexamine the effectiveness of its complaint procedures. There was evidence that complaints were lost or, in some instances, ignored. Obviously, an efficient and effective complaint procedure is required if the State Police is to enforce its own policy against illegal conduct. The court does not, however, find that the inadequacies of the complaint procedures mandate a finding of pattern and practice.

The court must now determine what remedy to apply in those specific instances in which civil rights violations took place. Lewis v. Kugler, supra, 446 F.2d at 1351 (Fn. 17). Injunctive relief at this stage is inappropriate. First, the court is mindful of the principle enunciated by the Court of Appeals in its prior opinion.

> * * * A federal court should avoid unnecessarily dampening the vigor of a police department by becoming too deeply involved in the department's daily operations, both because of the vital

> public interests at stake, and because of the danger that the court could become enmeshed in endless time-consuming bickering and controversy. * * * Lewis v. Kugler, supra, 446 F.2d at 1351.

The nature of the present violation does not warrant large scale injunctive relief.

Second, the court does not find a "substantial threat" of future violations on the part of those Troopers who have been guilty in the past. The institution of this suit and the passage of time and the consequent change of life styles and opinions[10] have had a beneficial effect on the problem which is the subject of this litigation. Therefore, the court feels that injunctive relief directed against specific Troopers would be inappropriate at this time. This does not mean, however, that the court would hesitate to shape such relief if future misconduct on the part of the named defendants is brought to its attention.

The question of money damages remains. Such damages are appropriate in actions brought under 42 U.S.C. § 1983. Fisher v. Volz, 496 F.2d 333, 346-347 (3d Cir. 1974). Those named plaintiffs whose Fourth Amendment rights were violated may apply to the

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[10] The court notes that long hair styles have become widely accepted with the passage of time. The court also opines that long hair is, to a certain extent, going out of fashion.

court within 30 days of the date of this opinion for a hearing date for assessment of money damages. Such damages will be awarded where legally possible.

In closing, the court wishes to emphasize that its decision not to grant injunctive relief should under no circumstances be taken as approval of the illegal practices of some of the State Troopers. The attitude evidenced by the Troopers in findings 1, 16 and 38 have no proper place in law enforcement. Such attitudes do more to harm the goals of law enforcement than to benefit it. See Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting opinion of Brandeis, J.). Such conduct cannot be permitted to continue.

The defendants should submit an appropriate order.

/s/ H. Curtis Meanor
H. CURTIS MEANOR
U.S.D.J.

DATED: November 13, 1975.

DISTRICT COURT'S FINDINGS OF FACT CONCLUSIONS OF LAW

1. On December 1, 1970, plaintiffs Jeffrey Fogel and Stuart Ball, both of whom are lawyers, were traveling in a Volkswagen van along the Garden State Parkway when they were pulled over by State Trooper Hook. After checking the license and registration of the driver (Stuart Ball), which were produced, and asking the destination of the vehicle, Trooper Hook proceeded to the passenger side of the car and ordered Mr. Fogel out of the vehicle. He then sat down within the vehicle and commenced a search of packages on the convenience shelf with his hands. After this action was objected to by Mr. Fogel and Trooper Hook learned that Mr. Fogel was an attorney, Trooper Hook engaged the two plaintiffs in a discussion on the Fourth Amendment. He subsequently allowed them to proceed with their journey. During this discussion, Trooper Hook stated, "It is much more important to us that we stop crime than that we observe the Fourth Amendment." No summons was issued. (T15-21, 25) This search was illegal, there being no probable cause for, consent to, or other proper basis for it in law.

2. On November 13, 1971, Todd Bowen and Michael Lockett, both school teachers, were passengers in a car driven by Robert Kennedy, a law student. After turning off Route 4 onto Bogart Road, the car was stopped by State Troopers Callahan and Heilman. While Mr. Kennedy left the car to speak with Trooper Callahan, Trooper Heilman circled the stopped vehicle, peering in from different angles. When Mr. Bown and Mr. Lockett also got out of the car of their own volition, Trooper Heilman approached the open door and flipped back the back of the front seat (this was a two-door vehicle -- Mr. Bowen had left the back of the front seat tilted forward when he got out of the car), exposing whatever may have been on the front seat. Mr. Kennedy was issued a summons for allegedly making an unsafe move some 15 to 20 minutes before, six miles back on the highway, despite having been told earlier that he was to be issued a summons for speeding. (T121-34). This was an illegal search, there being no arrest involved; nor was there any consent thereto, or probable cause therefor.

3. On approximately April 19, 1969, plaintiff Wayne Barrett, a teacher of mentally retarded children, was driving with three of his black pupils along the New Jersey Turnpike. He was stopped by two State Troopers, one of whom asked him for his license and registration while the other ordered the three retarded students out of the car. He entered the vehicle and commenced a thorough search of the entire inside, including searching the glove compartment and pulling out the back seat. After searching the interior of the car, the Troopers removed the luggage from the trunk and searched through the contents of both Mr. Barrett's luggage and the luggage of the three students. Mr. Barrett continually objected to both the search

of the car and the search of the luggage. No summons was issued or discussed. As a result of this incident, Mr. Barrett sent a letter of complaint to the A.C.L.U. He has since kept his hair trimmed considerably shorter. (T209-15) This was an illegal search in its entirety; there was neither probable cause therefor, nor consent thereto.

4. On September 26, 1970, at approximately 1:30 a.m., plaintiff Warren Hergenhan was traveling in his girlfriend's Volkswagen bus on Route 4 when he was stopped by two State Troopers. One Trooper approached on the passenger side and asked Hergenhan to open that door, which he did. The other Trooper asked Hergenhan, "Where did you hide it?" and revealed that when Hergenhan had passed the Troopers they had seen him hiding something. Hergenhan stated that they must have seen him changing tapes on the tape deck which was located under the convenience shelf on the passenger side. That Trooper then asked for Hergenhan's license and registration. When Hergenhan could not produce the registration, one Trooper asked Hergenhan to get out of the car while the other Trooper entered the vehicle from the passenger side, produced the registration card from the convenience tray and handed it to the other Trooper and continued to search extensively the inside of the vehicle. At this point, Mr. Hergenhan protested. No summons was issued. The plaintiff then attempted to ascertain the identity of the

Troopers but was unable to do so. He subsequently contacted the A.C.L.U. (T305-10) Insofar as the Trooper searched for proof of ownership, the search was valid; but, once the Trooper had found the car's registration, any further search would have had to be based on some other exception to the warrant requirement. As the furtive movement of Hergenhan was not coupled with any corroborative information, there was no probable cause for the search under the law; nor was there consent to that part of the search occurring after the registration was found. Thus, this search was illegal.

5. In the summer of 1969, plaintiff Hergenhan was exiting from Route 4 at Grand Avenue in Englewood when he was stopped by two State Troopers. While one Trooper checked his license and registration and alerted Hergehan to the fact that one headlight was out, the other entered Hergenhan's car and used his flashlight to search through the interior, including the console between the two front seats. This was done without asking Hergenhan's permission. (T314-15) Hergenhan ultimately received a warning. This search was illegal as Hergenhan did not consent thereto, and there was no probable cause or other legal basis for the search.

6. On March 15, 1970, plaintiff John Henry Browne, an attorney, was

driving north on the New Jersey Turnpike in a vehicle with California license plates when he was stopped by a State Trooper approximately 40 miles from the Delaware Bridge. After checking Mr. Browne's license and registration, Mr. Browne inquired as to why he had been stopped, to which the Trooper responded that it was because he had long hair, a California license plate and was likely to be transporting drugs. The Trooper then proceeded, after Mr. Browne's refusal to give permission, to enter the vehicle and search its interior. When he discovered, from the presence of law books in the back seat, that Mr. Browne was a law student, the Trooper stopped the search and left, after apologizing. No summons was issued. (T363-73) There was no probable cause for this search, nor was there consent or any other legal basis for it. Thus, it was an illegal search.

7. On June 4, 1970, plaintiff Allen Ressler, an attorney, was stopped on the New Jersey Turnpike near Exit 4 by a State Trooper in an unmarked car. After checking the plaintiff's license and registration, the Trooper asked if he could search the car. Even though Mr. Ressler replied that he did not want his car searched, the Trooper replied, "Well, I'm going to search it anyhow." He proceeded to look in the glove compartment and lift up (and inspect underneath) both front seats and behind the back seat. The officer had conceded that Mr. Ressler and Mr. Blumberg, a passenger in Mr. Ressler's car, were not under arrest. Then Mr. Blumberg, also an attorney, questioned the Trooper's probable cause for this search. At this point, the Trooper stopped the search and, upon learning that Mr. Blumberg was an attorney, left, after stating that it was his policy to protect the citizens from drugs and arms by stopping and searching long haired persons even though he knew that anything he found could not be used as evidence against them. (T373-78). There being no consent to or probable cause for this search, it was an illegal search in the absence of other legal basis for it.

8. On September 6, 1970, Stephen Manulkin was stopped by a State Trooper between the Union Toll Plaza and Exit 148 of the Garden State Parkway. After checking his license and registration as part of a "routine check," the Trooper proceeded, without asking for permission, to search through the glove compartment and the back seat of the car and, finally, to feel the pants pockets of the seated Mr. Manulkin. Manulkin did not protest the search. No summons was issued. Manulkin contacted the A.C.L.U. a couple of months later. (T384-88) The search of the car was illegal as there was no probable cause for the search and consent was not even sought. The frisk of Mr. Manulkin was also improper as there was no

basis for a reasonable belief that Manulkin was armed and presently dangerous, nor was any arrest made.

9. In March 1970, plaintiff Robert McMasters, an attorney, was a passenger in a car traveling upon the New Jersey Turnpike close to the Delaware-New Jersey border when the car was stopped by a State Trooper. After checking the license of the driver, one Ronald Rosen, the Trooper proceeded to walk around the car, peering through the windows. As Rosen had been unable to produce a registration, the Trooper then ordered Rosen to open the glove compartment. When Rosen was unable to do so, the Trooper himself forced the door of the glove compartment open and searched its contents. The Trooper never sought permission to enter the vehicle or search the compartment. McMasters did not object because of the tone of the Trooper's voice and his fear of the consequences of resisting. The Trooper left after searching the glove compartmnet. No summons was issued. (T468-73) This search was proper, as one designed merely to lead to proof of ownership of the vehicle involved.

10. In the latter part of 1965, Leslie Tobin, a businessman, was transporting goods in a vehicle bearing New York license plates from his warehouse

in Philadelphia to a store in Woodstock, New York, when he was stopped along Route 1 in New Jersey by a State Trooper. Mr. Tobin got out of his car and locked it. Thereupon, the Trooper ordered him to open the car if he did not wish to have the vehicle impounded: "Either you open the door, we want to search your car, or we will impound your car, take it in and you will be detained." When the car was unlocked, the Trooper entered the car and conducted a thorough search of the interior. The search included looking inside the glove compartment, in the back of the vehicle, and behind the seats. No summons was issued. (T499-501) This search was improper. There was no consent to the search as Tobin was acting only out of fear of further harassment. Moreover, the mere locking of the vehicle by Tobin, while it was a furtive movement, did not in and of itself give rise to probable cause.

11. On a later occasion, Mr. Tobin was stopped by a State Trooper who followed him off the New Jersey Turnpike at Exit 6. The Trooper did not request Tobin's license or registration, but merely stated that he wanted to search the vehicle. Without saying anything, Mr. Tobin rolled down the rear window from

the front, neither objecting nor giving permission. The Trooper went to the back of the station wagon which Mr. Tobin was driving and began to search through the merchandise within the vehicle. No summons was issued. (T501-03) This was a warrantless search rendered valid by consent.

12. On another occasion, Mr. Tobin was traveling along the New Jersey Turnpike approaching Exit 9 when he was stopped by a State Trooper. The Trooper ordered him to follow his car, and led Mr. Tobin to an administrative building at Exit 9. There, after taking the Passengers into the administrative building, the Trooper entered the vehicle and searched its contents, wanting to know whether Tobin had any firearms or drugs. Tobin gave no overt permission for the search, but did not object either. No summons was issued. After being detained for over an hour, Mr. Tobin and his passengers were allowed to leave. (T507-22) In light of Mr. Tobin's prior experience with the law, and his awareness of his rights at this point in time, the court holds that the totality of the circumstances would indicate that he consented to this search.

13. In March 1970, Mr. Randolf Warsager, a college student, was stopped

by a State Trooper on Route 80. He was told that he had been driving in the left hand lane improperly, as he was only supposed to drive in the left hand lane in order to pass another car. After checking his license and registration card, the Trooper asked Mr. Warsager to open his trunk. The witness, unaware of the fact that he could refuse, did so. After looking in the trunk, the Trooper issued Mr. Warsager a warning for driving in the left lane. No attmpt was made to learn the Trooper's identity. (T563-65) This was a legal search. Warsager's consent was more than mere acquiescence to authority of a State Trooper as he opened the trunk without any objection or hesitancy whatsoever, without any coercive activity on the part of the Trooper.

14. In April 1970, Mr. Warsager was again stopped along Route 80 by a State Trooper. After asking Mr. Warsager and his two friends where they were going, whether they had jobs, and whether they had contraband, the Trooper asked them, in an ordinary tone, to get out of the car so that he could look. He then proceeded to search the glove compartment, under the seat, and the back of the vehicle. When the occupants asked why the Trooper had stopped them, he responded

that it was a routine check. No summons was issued. About a year later, Warsager contacted the A.C.L.U. when he learned about this case. (T565-66) This was an illegal search. While the activity of the Trooper was proper, it was a sufficient show of authority to intimidate the subjects to the point that they were merely acquiescing to his authority. Certainly, there was no probable cause for the search.

15. On July 4, 1970, plaintiff Vaccaro was traveling with his wife and another couple along Route 206. When he turned off the highway into the Stokes Forest camping area, he was stopped by a State Trooper. When the Trooper had finished checking the license and registration card, he asked Mr. Vaccaro to leave the car. He then proceeded, without probable cause or reasonable gounds to do so, to look under the front seat for 15 or 20 seconds. Upon sighting Mrs. Vaccaro's pocketbook upon the front seat, the Trooper spilled out the contents onto the seat, going through them with his hands. Satisfied that there was nothing in the pocketbook, the Trooper returned the license and registration to Mr. Vaccaro. He did not put the contents of the pocketbook back into the pocketbook. Neither Vaccaro nor his wife

gave him permission to search either the vehicle or the pocketbook. No summons was issued. (T584-86). This was an illegal search. There was no probable cause for a search, nor was consent given.

16. On July 5, 1970, Thomas Hoffman, a law student, was riding in a large converted bakery truck with eight to ten other persons along the New Jersey Turnpike when the vehicle was stopped by a State Trooper at a point which was approximately one hour's drive from the George Washington Bridge. The driver was asked for his license and registration, and was asked why his license plate was wired on rather than bolted on. During this conversation, the Trooper noticed that some of the people in the back appeared quite young and, despite the driver's statement that they weren't runaways and indeed had documents and parental permission, the Trooper went to the back of the truck, opened the door and began to ask each passenger whether he or she was a runaway. The passengers, who were minors, claimed to have parental permission and offered documents to prove it. The passengers, in compliance with the Trooper's order to get out, exited from the vehicle. During a scuffle between the first Trooper and a passenger, a second Trooper arrived. Without

speaking to anyone, this Trooper approached the open van, leaned in the back and began a casual search through the sleeping bags, food containers, and reading material which were inside the van. After this search, Mr. Hoffman and the other passengers were taken to a station so that the Troopers could make phone calls to determine if any were runaways. There, the policeman making calls searched through a camera bag belonging to Mr. Hoffman. No explanation was given for this search, nor was any permission sought. After examining the contents of the camera bag, the Trooper felt Mr. Hoffman's pants pockets and had him empty the contents of the pockets. These contents were subsequently searched. During discussions with this policeman, Hoffman revealed that he was a law student working for the New Jersey Public Defender's office. The Trooper became very self-effacing and embarrassed and mumbled statements to the effect that it was, after all, his job to harass people. Having been detained for approximately two hours, all of the passengers were released. No one was arrested and no summons or warnings were issued. No effort was made by Hoffman during this period to ascertain the identity of either Trooper, but he did write to Stanley Van Ness, Chief Public Defender, about the matter. (T638-61)

The search of the rear of the van by the second officer was not a legal search, since there was no probable cause for believing that the rear of the vehicle contained contraband, nor was there consent to the search. The serach of Hoffman's camera bag was legal as an incident to taking Hoffman into custody since the camera bag was clearly within Hoffman's immediate control. The search of Hoffman's pockets was also one that was an appropriate adjunct to taking Hoffman into custody.

17. On August 26, 1970, plaintiff Dennis Auciello, a law student, was driving with a friend from East Brunswick to Trenton, New Jersey, along U. S. Route 1. Mr. Auciello and his passenger were on their way to a conference at which Governor Cahill and Colonel Kelly were to be in attendance. At approximately 2:15 p.m., he was stopped by a State Trooper between South Brunswick and Monmouth Junction. After checking this plaintiff's license and registration card, the Trooper asked Mr. Auciello: "Do you mind if I take a look inside your trunk?" Mr. Auciello, fearing reprisals if he refused and generally feeling the

pressure of authority exerted by this Trooper, told the Trooper to "Go ahead." The Trooper, however, further demanded that Mr. Auciello get out of his automobile and open the trunk himself. When Mr. Auciello complied, the Trooper looked inside the trunk. The Trooper then proceeded to the front of the car, peering into the vehicle as he did so. After being questioned as to where he was going, Mr. Auciello was permitted to proceed with his journey. No summons was issued. (T662-83)

At the conference attended by Governor Cahill and Colonel Kelly, Mr. Auciello mentioned this incident to Colonel Kelly, asking him if it was a normal, duly initiated and official policy of the New Jersey State Police to systematically stop and search people with long hair who travel on New Jersey roads. Colonel Kelly responded: "Of course not. We never do it." When Colonel Kelly was asked by Auciello why a search might have been conducted during a routine check, Colonel Kelly stated: "You have to realize that there is a natural antagonism between law enforcement officers and students and that if you are subjected to a search, it is because it is only natural for the officer to do this." (T665-68) Judging the totality of the circumstances, including Auciello's awareness of his right to refuse permission, it would appear that Auciello consented to this search, rendering it valid.

18. On April 1, 1971, plaintiff Frank St. Claire, a student and a teacher, was a passenger in a car driven by William Kinnaman along the New Jersey Turnpike. The car was stopped by State Trooper Good, who, after checking the license and registration, either requested or ordered the driver out of the car and frisked him. The Trooper then frisked Mr. St. Claire and reached into his pocket, pulling out a handkerchief. Mr. St. Claire consented to neither of these actions. The Trooper next ordered this plaintiff to open the glove compartment, the contents of which were removed and examined by the Trooper. As he continued his search, Trooper Good inspected the floors of the front and back, including looking in a small paper bag, and went through the driver's coat, which was lying on the back seat, as well as searching Mr. St. St. Claire's coat. Finally, Trooper Good asked plaintiff Frank St. Claire for identification. When this was produced, the Trooper left. No summons was issued. The Trooper's car bore the license number TPA-819. When Mr. St. Claire got home, he wrote to the

New Jersey Turnpike Authority, receiving a response from the Commander of Troop D in which further details were sought. Mr. St. Claire wrote again in turn, received no response, so, on June 4, 1971, he wrote to Governor Cahill. The Commander of Troop D again responded, asking details again. Mr. St. Claire responded, but never heard anything back. (T683-87; 694-95) The frisk of the driver and the frisk of St. Claire were improper. Insofar as the Trooper reached in and pulled out a handkerchief, he went beyond the scope of a proper frisk. In neither case did he have a reasonable belief that the person to be searched was armed and presently dangerous. The search of the car was improper, not being based on probable cause or consent.

19. On November 15, 1971, Mr. Lawrence Welsch, a computer scientist, was driving on the New Jersey Turnpike when he was stopped by a State Trooper between Exit 4 and Exit 5. The time was shortly after 10 p.m. After asking for a license and registration card, the Trooper conducted a flashlight search of the interior of the car, duing which he questioned Mr. Welsch about some tape cassettes in the back seat. While looking at the license and registration, the Trooper asked whether

Welsch was carrying contraband, to which Welsch replied in the negative. The Trooper next walked around to the passenger side of the car and attempted to open the door, which was locked. Welsch opened it because he though the Trooper wanted to ask some more questions. Then the Trooper stuck his head in the car and asked to look in the glove compartment. Mr. Welsch verbally acquiesced to this request because he felt the Trooper was going to look anyway, and he feared that any other response would lead to a prolonged search and/or detention. When Mr. Welsch asked why he had been stopped, the Trooper stated that he had noted that the vehicle had a red sticker which indicated the vehicle had failed inspection; however, Mr. Welsch was still within the grace period. (T771, 773-774) The Trooper not only searched inside the glove compartment, but also leafed through papers and articles in the front seat. When Mr. Welsch asked for the Trooper's name and badge number, neither of which could be seen because it was dark and the Trooper was continuously shining his flashlight into the car, the Trooper promptly left without identifying himself. Mr. Welsch subsequnetly called the New Jersey State Troopers' Barracks, but he was unable to learn the name of the Trooper. No summons was issued. (T768-75).

This was an illegal search. The officer's conduct up to the point when he sought consent to a search was such as to deprive Mr. Welsch of the feeling that he had a right to refuse that he could freely exercise.

20. At 1 a.m. on October 17, 1971, Mr. Thomas Enroth, a high school student, was parked at a restaurant along the Garden State Parkway when his vehicle was approached by a State Trooper. After checking Mr. Enroth's license and registration, the Trooper ordered Enroth to leave as the Trooper had "told [him] not to come back here again." [The same Trooper had ordered Enroth to leave two days earlier because he didn't like the way Enroth and his companion looked.] Then, one of Enroth's companions said, "Let's not come back here again." The Trooper returned to the car and said, "If you want to play tough, I can be just as hard to you as you are to me." He then reinspected the license and registration and went through the vehicle inspection process, examining lights, blinkers, and brake lights. Finding no flaws, the Trooper then reached into the car and removed a brown paper bag from the back seat. When he had inspected and replaced this item, he entered the vehicle and removed a can from the back

of the car. Both these acts were done without Enroth's permission. After inspecting the can, the Trooper returned it to Mr. Enroth and departed. No summons was issued. Enroth's mother later wrote to the Bergen Record and the State Police. (T797-803) This was an illegal search insofar as the Trooper reached into the car and removed a brown paper bag and a can from the area of the back seat. Clearly, Enroth did not give the Trooper permission to search. While the items may have been in plain veiw, their nature was not such as to warrant this intrusion.

21. On Septermber 12, 1970, plaintiff Peter Gilmore, a law student, was riding in a car driven by his brother-in-law along the New Jersey Turnpike when their car was pulled over by a State Trooper at 12:30 p.m. After stating that the car had been going a little bit too fast, about 70 m.p.h., and after checking the driver's license and registration, the Trooper went around to the passenger's side of the car and asked Peter Gilmore to get out of the car. The Trooper then patted the jacket and pants pockets of Mr. Gilmore and ordered him to empty the contents of one of them. Mr. Gilmore complied because it was his philosophy at the time that policemen always have the last word, because he was rather intimidated by this Trooper, and because he did whatever Troopers asked him to do, just to avoid

trouble. Thus, despite the fact that he felt that the pat-down was improper, he decided to let the Trooper go ahead as he knew the Trooper wasn't going to find anything. After this, the Trooper reached under, around and behind the front seat. He next ordered the driver to open the trunk, which he then searched. Neither occupant gave permission to search the car or the trunk. No summons was issued. (T871-75) While, under all the circumstances, it appears that Mr. Gilmore consented to the search of the contents of his pockets, it is clear that there was no consent to nor probable cause for the search of the vehicle itself.

22. In February 1969, Mr. Martin Kellman, a college professor, was traveling as a passenger in a vehicle along the New Jersey Turnpike when the vehicle was stopped by two State Troopers for having a defective tail light. One of the Troopers approached the car and ordered everyone out of it. He then commenced a thorough search of the entire vehicle, without asking permission to do so from anyone. This search included pulling up and looking underneath the seats, and in the glove compartment, and emptying the contents of two brown bags upon the front seat and searching through them. When Mr. Kellman objected that the search was illegal, the Trooper searching the vehicle threatened, "Well, I could keep you all night. We could discuss that in the morning." He then continued with his illegal activity. After 40 to 45 minutes of searching, the Troopers departed. No summons was issued. (T879-85) This was an illegal search, supported neither by probable cause, nor by consent, nor any other exception to the warrant requirement.

23. On April 29, 1971, Mr. Joseph Alt, a teacher, was driving with Mr. William Theboler along the Garden State Parkway when he was pulled over by a State Trooper. The Trooper checked Mr. Alt's license, but, when he was unable to find his registration card, the Trooper ordered the occupants out of the car and proceeded to search in the passenger door, the glove compartment, and under the front seat. Mr. Alt protested this action. The Trooper said he had the right to so search when a registration was not produced, and then ordered Mr. Alt to open the trailer at the back of his car. This was done also under protest, as Mr. Alt had the rental agreement for the trailer and ownership of it was not questioned, and the Trooper looked inside the trailer. Finally, the Trooper asked Mr. Theboler if he could search his pockets. Mr. Alt objected to this, but the Trooper proceeded to search Mr. Theboler's pockerts without obtaining his consent. The Trooper then left without issuing a summons. The incident had taken 45 minutes.

(T920-23) There is no question but the search of the automobile and the trailer were justifiable as searches designed to yield proof of ownership of the automobile; however, the search of Mr. Theboler's pockets was illegal as not being based on consent or probable cause, or any other valid ground.

24. In August 1971, Mr. Thomas Pathway, a disabled worker and former student, was driving a Volkswagen van along the New Jersey Turnpike when he was pulled over by a State Trooper. After checking Mr. Pathway's identification, the Trooper stated that he was going to search the car because he felt that Mr. Pathway had acted furtively in not looking around when the Trooper sounded a siren. He then conducted a thorough search of the vehicle, including looking within the refrigerator and underneath the bed. No summons was issued. (T1057-60) This was an illegal search because the furtive movement in and of itself did not give rise to probable cause to search.

25. In the early part of July 1971, Mr. Pathway was driving with Mr. Gregory Gallagher along the New Jersey Turnpike when he was pulled over by a State Trooper and issued a warning for speeding. As Mr. Pathway was getting ready to depart, the Trooper asked him if he had any

contraband within the car. When Mr. Pathway replied that he had no contraband, the Trooper then asked to search the car. Mr. Pathway then asked if he had any choice in the matter and was told that he had the choice of having the car searched immediately or having it impounded, taken to the police station, and then searched. Mr. Pathway then consented to a search. The Trooper then conducted a thorough search of the vehicle, including looking under the dashboard, under the seats, and within the glove compartment, and trunk. (T1060-67) Faced with the inevitability of a search after impoundment and delay, Mr. Pathway's consent was not voluntarily given. That fact renders the search invalid.

26. In the summer of 1969, Mr. Ronald Greenblatt, a college student, was traveling along Route 1 enroute from Philadelphia to the Rutgers Jazz Festival when the car he was driving and another car driven by his cousin were pulled over by two State Police cars containing three Troopers. After checking Mr. Greenblatt's license and registration, one of the Troopers proceeded to search inside the glove compartment, underneath and behind the seats, and into the contents of a paper bag within the car. The Trooper did not ask permission to do this, but stated only that he was looking for drugs and ammunition. The car driven by Mr. Greenblatt's cousin

was searched in a similar manner. No summons was issued in either instance. (T1594-99) These searches were invalid as not being based on probable cause, consent, or other valid legal ground.

27. On the July 4th weekend of 1969, Mr. Greenblatt was driving along Route 15 enroute to Stokes Forest when he was stopped by a State Trooper. After checking Mr. Greenblatt's license and registration, the Trooper searched the inside of the vehicle quite thoroughly. No summons was issued. (T1597-99) On the same day, Mr. Greenblatt was stopped by a different State Trooper. Greenblatt informed the Trooper that his car had already been searched that day. The Trooper responded, "Well, if you have been searched once today, you can keep going." He allowed Greenblatt to proceed, without issuing a summons. (T1598-99) The search by the Trooper during the first stop was clearly illegal, being based on neither probable cause nor consent.

28. On the Labor Day weekend of 1970, Mr. Greenblatt was again enroute to Stokes Forest when he was stopped by a State Trooper at a spot which was approximately 20 minutes away from that park. After checking Mr. Greenblatt's licnse and registration, the Trooper ordered him to empty his pockets, which Greenblatt did . The Trooper then searched the inside of the car and ordered

Greenblatt to open the trunk; Greenblatt complied with this order. Then Mr. Greenblatt objected to this conduct, stating that it was an illegal search. The Trooper explained: "Who are you trying to kid. You know as well as I that a lot of people who look like you do things that are wrong." The Trooper then continued his search, ultimately asking Mr. Greenblatt to empty his pockets. No summons was issued. (T1603-05) Both the search of Mr. Greenblatt and of his car were illegal; the former went beyond the justifiable scope of a frisk and was not warranted to begin with. The latter was not consented to ultimately, although preliminary acquiescence was present.

29. On June 17, 1970, Mr. Timothy Ferris, the New York editor of the Rolling Stone Magazine (a national publication), was driving north along the New Jersey Turnpike. Having stopped at a service plaza, he returned to the car he was driving and found that a State Trooper had pulled in front of him. Trooper Laird asked Ferris for his license and registration. Ferris produced his license but was unable to produce the registration, explaining that he had papers which would show that the car was a "drive-away" car that he was transporting cross-country for the owner. When Ferris' traveling companion opened the glove compartment to produce these papers, Trooper Laird noticed that there

was a small bowl corncob pipe in the car. After inspecting the papers and telling Ferris they were insufficient, Laird removed the pipe. No permission was sought when he reached into the car and none was given. After inspecting the pipe and smelling it, the Trooper used his radio to call for an N.C.I.C. check on the car and then returned to Ferris' car. At that point, he reached over the back part of the car (the car was a convertible and during this incident the top was down) and began to search through the luggage in the back seat. As this second search commenced, the Trooper requested permission to search, but did not wait for a reply; none was given. An arrest for possession of narcotics, i.e., marijuana and hashish, resulted from this latter search. The validity of the search was not challenged in the criminal proceeding which resulted because Mr. Ferris pleaded guilty to a disorderly persons charge when he was unable to obtain bail. (T325-52) The original search of the glove compartment by the Trooper was justifiable as likely to produce proof of ownership. The circumstances were also such as to give rise to probable cause for the search and inspection of the pipe, especially given the fact that the initial observation of the pipe was when the area was open to plain veiw. The ultimate search of the luggage in the back seat was one which appears to have been consented to, as the

occupants were able to object for several moments before contraband was discovered.

30. On March 9, 1972, Mr. Gary Picone, a college studnet, was driving along Route 80 at 8:50 a.m. when he was passed by a State Police car traveling at a very high rate of speed. Mr. Picone thought that the police car might be speeding improperly, so he speeded up to follow the police car and copied down its license number. At about that time, another State Police car, driven by Trooper Slack, pulled alongside. Picone motioned to Trooper Slack to follow him. They drove to a State Police station at Little Falls, New Jersey, where Mr. Picone inquired into the propriety of a police car's traveling at such a high rate of speed without siren or blinker. After seeing the police car in question at the station, Mr. Picone related this incident to Trooper Slack. Trooper Slack asked him for his license and registration and informed him that he was being issued a traffic ticket for traveling 95 miles an hour along Route 80. They both went back outside the station. After Mr. Picone produced his license, but stated that he could not produce the registration, he and Trooper Slack were joined by two other Troopers, one of whom was Trooper Philips. (Mr. Picone testified that Philips was the driver of the police car whose high speed driving had originally motivated Mr. Picone to go

to the police station.) At that point, Trooper Philips ordered Mr. Picone to place his hands upon the car and spread out his feet. The Trooper then proceeded to frisk Mr. Picone because he was excited and complaining about the speed at which the first police car had been traveling when there was no emergency requiring such speed. After Trooper Philips completed the frisk, Trooper Slack issued two summonses, one for traveling 95 miles an hour along Route 80, and another for driving without a registration card. (T1570-85; 1746-96) This frisk was valid as Trooper Philips had reason to believe that Picone was armed and presently dangerous.

31. On January 17, 1971, plaintiff Douglas Star, a civil draftsman, was riding along the Garden State Parkway and he was stopped at approximately 7 p.m. by two vehicles; one was an unmarked yellow and white Ford. In light of Trooper Dalrymple's testimony to the effect that such vehicles were never used by the State Police, the court finds that this has not been proved to be a State Police vehicle. The other vehicle was a marked State Police car. Two policemen, of whom at least one was a State Trooper, approached Star's vehicle. After checking the driver's license and the registration card, as produced by Star, the two Troopers ordered both the driver and Star out of the car, declaring that they would like to search the car.

Star remained in the car as he was wearing a leg cast. One officer then entered the car on the driver's side and looked under the front seats, into the glove compartment, under the dashboard, and behind the back seats. The Troopers inspected the rear of the passenger compartment from outside of the vehicle using their flashlights. A jacket on the floor of the front seat was searched. Star stated that he did not protest the search as he was not fully aware that he could resist. No summons was issued as the Troopers left after stating, "Sorry we had to search the car, we just wanted to check." (T402-14) This was an illegal search. There was neither consent to the search nor probable cause for it, and the court cannot discover any other legal ground for the search.

32. On or about September 23, 1970, at approximately 2 p.m., plaintiff Joseph Vaccaro, a college studnet, was stopped at the Essex Toll Plaza of the Garden State Parkway by a State Trooper. After checking this plaintiff's license and registration card, the Trooper asked Vaccaro to get out of the car, which he did. The Trooper then asked, in belligerent fashion and hostile tone, if he could search, to which Vaccaro responded, "No, I don't give you permission to search the car and furthermore it is illegal." After learning that Vaccaro attended Montclair State College, the Trooper said:

"Well you better go back there and learn the law because you can't tell me what to do." At this point, Vaccaro thought it futile to protest, and the Trooper chose to search the vehicle, despite Vaccaro's objections. During the search, the Trooper looked under the dashboard, under the front seat, and in the trunk, all the while asking Vaccaro where the narcotics were, threatening him with impoundment of the car. No summons was issued. Mr. Vaccaro copied down the license number of the Trooper's car (SCY 977) and notified the A.C.L.U. when he got home that day. (T579-84) This was clearly an illegal search; it was not consented to, nor was there probable cause for it. There is no other discernible justification for it.

33. On June 7, 1970, plaintiff Albert Porter, a college professor, was driving north on Route 130 with Miss Marion Lewis, a graduate student, when they were pulled over by State Trooper Boylan within a mile after the Route 206 intersection. Plaintiff Porter left his car to meet Trooper Boylan. The Trooper stopped Mr. Porter at the back of his car, suddenly pushed Mr. Porter's hands into the air and frisked him. Mr. Porter was shocked by this procedure ad asked the Trooper why he had done this. Trooper Boylan replied that he had to do this for his own protection. Trooper Boyla then checked plaintiff Porter's license and registration card and asked permission to search the vehicle. When Mr. Porter objected to this, Trooper Boyland conducted a visual search through the open door and ordered Mr. Porter to open a suitcase in the back of the vehicle. When this order was complied with, Trooper Boyland searched through the contents of the suitcase and through the other luggage in the back of the vehicle, as well as inside the door pockets. He then, over Miss Lewis' objection, opened her pocketbook and began examining the contents. Trooper Boylan finally returned the license and registration card to Mr. Porter and left. No summons was issued. The next day, Mr. Porter called the Bordentown State Police Barracks and lodged a complaint. (T182-207; 1369-74) The frisk was illegal as Trooper Boyland had no reason to believe that either occupant was armed and presently dangerous. The search of the car and the pocketbook were also illegal as there was clearly no consent to them, nor was there probable cause therefor.

34. In the winter of 1968-69, plaintiff Warren Hergenhan was traveling in a Volkswagen driven by Mr. Joseph Perona when they were pulled over by State Trooper Hook and another State Trooper just as they had left Route 4 at the Leonia exit. The two Troopers left their vehicle and approached Mr. Perona's car from both sides. The Trooper on the driver's side asked Mr. Perona if he could look inside the trunk. The Trooper on the passenger's side opened the door of the car and was about to open the glove compartment when Mr. Hergenhan

objected that such a search was illegal. At that point, Mr. Perona asked Mr. Hergenhan to let the Trooper look into the glove compartment. When the one Trooper had finished a thorough inspection of the glove compartment, and the other had searched the trunk, they departed. No summons was issued (T310-14) This search was legal as Mr. Persona clearly consented to it, knowing that he had a right to refuse.

35. On February 7, 1969, Mr. Philip Danzig, an architect, was driving his 1962 MG Midget on the Garden State Parkway when he was approached from behind by a car driven by a State Trooper. Mr. Danzig pulled his car off the road when the Trooper signaled to do so. After checking Mr. Danzig's license and registration, the Trooper walked around to the passenger side of the vehicle and asked how the car door worked. When Mr. Danzig explained that it opened by an inside latch, the Trooper then asked if he could try the latch. Mr. Danzig assented to the Trooper's request. The Trooper not only tried the latch, but also began feeling around the inside of the car, including under the dashboard, under the seats, and in the compartment behind the seats. Danzig did not object. The Trooper then issued Mr. Danzig a warning because a bolt was missing on the front license plate, an infraction which could not have

been seen until after Mr. Danzig had been stopped. (T523-40) Under all the circumstances, it appears that Danzig consented to a search of his vehicle, as the logical reason for the request to try the latch was the Trooper's desire to gain access to the inside of the vehicle.

36. In September 1970, Mr. Matthew Kaplowitz, a musician-composer, was driving his Volkswagen van with Indiana license plates along the New Jersey Turnpike near Exit 14 when he was stopped by State Trooper DeMauro and another State Trooper. Mr. Kaplowitz was derservedly issued a summons for the illegal use of the "Z", a roadway between the northbound and southbound lanes reserved for police. After issuing the summons, Trooper DeMauro pointed to the rear of the van and asked, "What is back there?" Kaplowitz responded, "There is nothing back there." Then DeMauro said, "Open it up." Kaplowitz responded, "There is no reason to open it. There is nothing there." At that point, DeMauro said, "Open it up because I don't have all night. Let's get on with it." Kaplowitze complied because of the hostile tone of DeMauro's voice and the fact that he had committed a violation. The two Troopers then entered the back of the van and conducted their search, leaving things in disarray. They ordered Mr. Kaplowitz to open his attache case, and searched its contents. Before departing,

Trooper DeMauro, upon repeated requests, gave his name to Mr. Kaplowitz. (T703-07) There was clearly no consent to this search. As only a summons was issued, there was no basis for a search incident to an arrest; nor was there probable cause for the search. At best, there was mere suspicion.

37. On February 8, 1972, Mr. Peter Jarvis was driving along Route 70 near the Laurelton Circle when he was stopped by State Trooper Lucarelli and State Trooper Bullet. Trooper Bullet stated to Jarvis that he was being given a warning because his right headlight was out. Trooper Bullet then asked for Jarvis' registration. As Jarvis opened the glove compartment to get his registation, Trooper Lucarelli aimed his flashlight in that direction and the Troopers saw a pipe in the glove compartment. Jarvis was then ordered out of his car. His shirt pocket and a leather puch on his belt were frisked by Trooper Bullet, who then asked that the contents of those two areas be displayed to him. Trooper Bullet then asked to see the pipe. Jarvis asked if they had any right to see it, as it was merely an ordinary smoking pipe. Trooper Bullet responded, "Just let me see the pipe." Jarvis showed it to him. The Troopers then issued him a summons for having malfunctioning headlights and taillights, and let him go. (T1461-79) The frisk was improper as there was no reason to believe that Mr. Jarvis was armed and presently dangerous. Moreover, the search of the glove compartment, while initially a permissible visual search, became illegel when the Troopers ordered the production of the pipe without probable cause for believing it to be contraband and without obtaining Jarvis' consent.

38. On May 3, 1970, plaintiff Jesse Berman, an attorney, was returning to New York in a 1967 Volkswagen camper bus from a meeting at Princeton to protest United States troops entering Cambodia. As he was approaching the New Jersey Turnpike along Route 1, he was stopped by a local police officer. Simultaneously, a State Police car stopped on the opposite side of the road. While the local police officer checked his license and registration card, State Trooper Hawke approached the passenger side of the vehicle, opened the front door, and reached into the convenience shelf, from which he began removing and inspecting various items, including a plastic bag containing auto parts. The auto parts were at the back of the shelf and, consequently, out of the view of someone sitting within the vehicle or standing outside of it. After this search, Trooper Hawke began demanding identification from the other two passengers. Mr. Berman objected to both the search of the convenience shelf and

the demand for identification from his passengers. Upon this objection, Trooper Hawke ordered plaintiff Berman out of the car and forced him to stand against the local police officer's car, threatening to mash his face into the cement, and claiming that it was his practice to stop people with long hair and beards in order to search for drugs. At this point, Mr. Berman informed Trooper Hawke and the local police officer that he was an attorney. The threatening immediately stopped and two summonses were issued by the local police officer, one of which was subsequently dismissed because there was no red light at the intersection referred to on the summons. (T31-39; 54-61) Trooper Hawke's search of the convenience shelf was clearly illegal. There was no probable cause for the search, the items searched were not in plain view, and there was no consent obtained from Mr. Berman.

39. On January 10, 1971, plaintiff Roger Kligler, a college student, was driving on Route 546 at approximately 5 p.m. when he was pulled over by State Trooper Seitz. Tooper Seitz testified that the reason the vehicle was stopped for a routine check in the first place was that it was unusual to see an out-of-state vehicle on that road. After checking Mr. Kligler's license and registration, Trooper Seitz asked if the plaintiff had any drugs or contraband

in the car, to which question Mr. Kligler answered that he did not. The Trooper then asked if he could search the vehicle. Mr. Kligler did not reply, but merely left the vehicle. Trooper Seitz conducted a thorough search of the inside of the car, including looking under the seats, in the glove compartment and in the back of the vehicle. The Trooper next ordered plaintiff Kligler to open the trunk, and Mr. Kligler complied with this order. No summons was issued.

Immediately after the incident, Mr. Kligler called the local State Police station and reported the incident to the desk sergeant, who later phoned him back and reported that Trooper Seitz had denied searching the car and that there was nothing further that he (the desk sergeant) could do about the matter. Mr. Kligler then reported the incident to his father, an attorney, who wrote a letter dated January 12, 1971 to defendant Kugler complaing of this incident. (P1) (T140-57) Under all the circumstances, the court concludes that Mr. Kligler consented, through his actions, to a search of both the passenger compartment and the trunk.

40. On March 14, 1970, plaintiff George Lewis, then a high school student (presently a college student) was traveling along the Garden State Parkway at approximately 7 p.m. when he was

stopped by two State Troopers, one of whom was State Trooper Tanner. While checking the license and registration card of plaintiff Lewis, Trooper Tanner conducted an extensive questioning of Mr. Lewis and the other Trooper conducted a flashlight search of the car. Still retaining this plaintiff's license and registration card, both Troopers returned to their car. At this point, Mr. Lewis and his companion walked up to the police car in order to retrieve the license and registration card, Mr. Lewis was ordered into the back seat of the police car. His friend was ordered to return to the Lewis car.

After further questioning, Mr. Lewis was also ordered back to his vehicle where he waited for 15 minutes until two other State Police cars carrying three Troopers arrived. A newly arrived plainclothesman began to question Mr. Lewis. During the course of this interrogation, Mr. Lewis noticed that one of the Troopers had entered his car through an already open door and was searching inside. Mr. Lewis addressed this Trooper, voicing his objection to the search of his vehicle. When the Trooper ignored the objection and continued to search, Mr. Lewis objected again to another Trooper who was standing nearby. The search produced a license plate registered to the family corporation, and a box of hard candy, each piece of which was unwrapped and

inspected. Finally, Mr. Lewis was issued a summons for failing to keep to the right and the three cars departed. The entire incident consumed nearly 45 minutes. (T157-174) This was an illegal search. The license plates were not in plain view, nor did the minor discrepancy between the name of the driver and that of the registration give rise to probable cause to search. Certainly, there was no consent to a search, given Lewis' objections.

41. On December 10, 1970, Mr. Patrick Ryan, a college student employed by the Community Relations Division of the Department of Justice, was driving along the New Jersey Turnpike with Mr. Kevin Lancaster, also a student, when he was pulled over by two State Troopers, one of whom was Trooper Thom, for having no taillights and a wobbly right rear wheel. As Mr. Ryan and Mr. Lancaster got out of the car and met one of the Troopers, the other Trooper went to the car, entered it, and conducted a search of the inside of the vehicle, an action which was objected to by Mr. Lancaster, the owner of the vehicle, in that he stated that if they wanted to search further they would need a warrant. At this point, the Troopers commenced a safety check of the vehicle, finding a broken taillight and one loose lug nut. Two summonses, consequently, were issued--one for an unsafe vehicle and one for the broken

taillight--and both Mr. Ryan and Mr. Lancaster were frisked and taken to the police station where they were required to post $50 bond. The frisk of Mr. Ryan was conducted because he seemed upset about receiving a summons. The frisk of Mr. Lancaster was conducted only because he was going to be riding in the back seat of the police car. The car, meanwhile, had been towed to a garage as it had not been possible to obtain a fuse for the brake light locally. Upon returning to the car, Mr. Ryan and Mr. Lancaster discovered that the contents of several bags had been emptied upon the seats. Christmas presents which had been in the back were on the front floor, the side pockets of the car had been emptied onto the floor of the vehicle, and the tail pipe had been disconnected. The Troopers denied knowing who had conducted the search; the owner of the garage denied doing it. On February 25, 1971, Mr. Ryan sent a letter complaining of this incident to State Attorney General Kugler. Copies of this letter were sent to Colonel Kelly and Governor Cahill. In response, Mr. Ryan received a letter from Colonel Kelly requesting phone numbers. On the night of the incident, Mr. Ryan also called Trooper Thom to complain about the fact that Christmas presents were ripped open. Eventually, a special report on the incident was prepared by Trooper Thom as a result of the complaints that had been registered.

(T182-89) The frisks of Mr. Ryan and Mr. Lancaster were justified under the circumstances as an incident to taking them into custody. However, the search of the vehicle was improper, being neither incident to the arrest nor based on probable cause. It was not a valid inventory search because the vehicle was not being impounded. However, the proof is insufficient to warrant a finding that the search was conducted by a member of the State Police.

42. On November 14, 1971, Miss Jessica Crosby, Mr. Leon Key, and Miss Maxine Chandler were riding along the New Jersey Turnpike at approximately 7:30 a.m. when the car in which they were riding was stopped by two State Police cars, one driven by Trooper Luzhak and the other by Trooper Dancisin, for a traffic violation. Trooper Dancisin approached the front seat of the passenger side of the vehicle, ordered the passenger, Mr. Key, to get out and spread-eagle himself against the Trooper's car. Trooper Dancisin then conducted a thorough search of the person of Mr. Key, including searching through his pockets and shoes, and yanking his hair. Meanwhile, Trooper Luzhak went over to the vehicle, searched the driver and the pocketbooks of the female passengers who were sitting in the car. Trooper Luzhak then took the key from the ignition, opened and searched the trunk, and returned to search inside

the vehicle. The stopping, the search of Mr. Key, of the women's pocketbooks, the driver, the trunk, and the inside of the vehicle were all protested by the passengers, but they were in turn threatened with arrest by both Trooper Luzhak and Trooper Dancisin for such verbal interference. The passengers and their car were then taken to the police station where Mr. Key's identity was checked. While there, Trooper Dancisin conducted a search inside of the vehicle. The driver was then issued a summons, and they were all released. (T254-84) The frisk and search of Mr. Key were legal as incident to an arrest, although formal arrest had not yet taken place. The same is true of the frisk of the driver. The search of the pocketbooks and the trunk by Trooper Luzhak was also incident to an arrest, even though the formal arrest had not yet been made. However, the search of the vehicle at the station was illegal as not based on probable cause, not incident to the arrest, nor a proper inventory search as the vehicle was not being impounded.

43. On June 9, 1971, at about 2 a.m., plaintiff Mark Antisz was violating the law by discharging passengers at the Pennsylvania Turnpike exit of the New Jersey Turnpike when State Trooper Duble pulled up. The Trooper talked to the passengers and then entered the car by way of the already open door on the passenger's side of Mr. Antisz's car. He sat down and began to search in the

glove compartment, which was open so as to give support to a tape system. All of this was done without seeking Mr. Antisz's permission. Trooper Duble stated that he had observed some vials of pills and some pipes in the glove compartment from his vantage point outside the car. From a distance, Trooper Duble saw nothing out of the ordinary as to the pipes, but he could not see any labels on some vials of pills in the glove compartment. Trooper Duble pulled out three vials of pills from the glove compartment, which pills, Mr. Antisz explained, were for his disability. (Mr. Antisz is a disabled veteran.) However, Mr. Antisz was unable to show that all of them had been procured by prescription. Moreover, inspection of the pipes led Trooper Duble to believe that they were the kind of pipes used to smoke hashish. He then placed Mr. Antisz under arrest. The Trooper then asked to search the car. When Mr. Antisz objected, Trooper Duble, nevertheless, proceeded to search the car, including underneath the seats. He then took the keys, and opened and searched the trunk. While the search was going on, Mr. Antisz took a cigarette from a pack on top of the dashboard and tossed the pack back onto the dashboard. Coming back to the car, the Trooper then examined the pack of cigarettes on top of the dashboard and found marijuana cigarettes inside the package. Subsequent to this search. Mr. Antisz was arraigned on a disorderly persons charge at a hearing in which the issue of the validity of the search was never presented. Mr. Antisz was not represented by an attorney at this hearing. He was found guilty later and fined $250. (T284-302)

This search was valid. The initial observation of the glove compartment was a valid observation of items in plain view. The physical search of the glove compartment was based on probable cause to believe that the vials of pills contained contraband. While from outside the vehicle the pipes did not seem out of the ordinary, the closer view of them as part of the proper search of the glove compartment gave probable cause to search them. The search of the car and the search of the cigarette package were both proper, being based on probable cause and being proper searches incident to an arrest.

44. On September 25, 1970, plaintiff Allen Gorden, a college student, was driving a 1969 Volkswagen to an 11 a.m. class when he was stopped on Highway 21 near Belleville by State Trooper Bershefski. Plaintiff Gorden left his car and produced, upon request, his license and registration card. When plaintiff Gorden asked why he had been stopped, Trooper Bershefski paused while he looked over the vehicle and then informed him that it was because his inspection sticker was improperly

attached. (The sticker, in the lower right hand corner, was attached by a piece of transparent tape.) The Trooper then performed a visual search and discovered a marijuana seed on the front floor of the car. After this, the Trooper searched the interior extensively, discovering one marijuana cigarette and fragments of others. When Mr. Gorden had protested that Trooper Bershefski had no right to search the vehicle, Trooper Bershefski stated that he had a right to do so because the sticker had been improperly attached to the windshied. Then, Trooper Bershefski opened the door, entered the car, and searched the interior of the vehicle, including the door pockets.

After the search, the Trooper issued a summons for operating a vehicle while in possession of narcotics. This evidence was unable to withstand a subsequent motion to suppress. (T482-87) The burden being on the plaintiffs in this proceeding, the court is unable to find this search to be illegal. In the court's view, the fact that the marijuana seed was found on the floor gave Trooper Bershefski probable cause to search the rest of the car. This is so despite Trooper Bershefski's statement that the search could be justified by the failure to have the inspection sticker properly attached.

45. On June 7, 1970, plaintiff Ellen

Urman was a passenger in a vehicle driven by James Donald along the New Jersey Turnpike when the car was pulled over by State Trooper Rinker, who was joined by another State Trooper in a separate car. Trooper Rinker approached the vehicle, checked the dirver's license and registration, and asked Ms. Urman what her name was. As the name on the registration was not the same as that of either of the occupants, and as Ms. Urman seemed nervous, the Trooper then ordered them out of the vehicle. Trooper Rinker then asked Ms. Urman for identification. In the process of obtaining identification, she opened her handbag and Trooper Rinker saw a roll of pink tissues in the back. As Trooper Rinker knew that tissues were sometimes rolled around marijuana cigarettes, he reached into the purse for the tissues and discovered five such cigarettes rolled up inside. He placed Ms. Urman under arrest. He then searched the interior of the car. Trooper Rinker then conducted a search of the person of Mr. Donald looking for weapons or contraband. Both were then taken into custody. Mr. Donald drove his car to the barracks and Ms. Urman rode with Trooper Rinker. No summons was issued to the driver. Ms. Urman was charged with a disorderly persons offense for the use of marijuana, to which she later pleaded guilty. (T540-50; T1429-58) Trooper Rinker's observation of the folded tissues in Ms. Urman's pocketbook gave him probable cause to search the tissues when considered with Ms. Urman's nervousness. The search of the vehicle and the frisk of Mr. Donald were proper searches incident to taking the two of them into custody, although Mr. Donald was not formally under arrest.

46. On December 1, 1971, plaintiff Dennis Auciello, a law student, was driving north along the Garden State Parkway at approximately 11:45 p.m. when he was pulled over by State Trooper Evans for weaving from lane to lane. After Mr. Auciello handed over his license and while he searched in the glove compartment for his registration card, the Trooper conducted a flashlight search of the front seat. He then asked Mr. Auciello if he had any alcoholic beverages in the car. The response was negative. Trooper Evans next ordered plaintiff Auciello to come out of his car and stand in front of the Trooper's car while Trooper Evans frisked him. Trooper Evans next administered a number of tests to determine if Mr. Auciello had been drinking because Trooper Evans had seen the car weaving from lane to lane. Mr. Auciello had not been drinking and the tests confirmed this. Finally, Trooper Evans issued Mr. Auciello a warning for inattentive driving. (T668-72; T1397-1415; T1483-95) The flashlight search of the front seat was proper observation of areas in plain

view. The frisk of Mr. Auciello was based upon a reasonable belief that Mr. Auciello was dangerous in light of the way he had been driving and the fact that Trooper Evans was working alone at night. The evidence as to the occurrence of other searches was in equipoise and, as the burden was on plaintiff Auciello, the court finds as a matter of law that they should not be considered.

47. On May 24, 1971, plaintiff Joseph DeOrio, director of the Y.M.C.A. in Long Branch, New Jersey, was driving a red panel truck upon Route 35 along with plaintiff Rosalie Rossi, an art teacher at Monmouth College, and plaintiff Richard Honymar, also a teacher at Monmouth College, when he was pulled over by State Trooper Kowal. After checking Mr. DeOrio's license and registration card, Trooper Kowal ordered him out of the car and around to the passenger side of the vehicle. After Mr. DeOrio denied having any drugs, the Trooper asked him if he could look into the truck, to which Mr. DeOrio replied in the affirmative. Instead of looking into the vehicle, Trooper Kowal proceeded to search Mr. DeOrio, including putting his hand inside this plaintiff's jacket and trouser pockets. Both Mr. DeOrio and Mr. Honymar objected to this search. Trooper Kowal then ordered Mr. Honymar out of the truck and began to go through his pockets. This was again objected to by

Mr. Honymar, so the Trooper stopped searching Mr. Honymar and leaned into the vehicle and searched through the glove compartment. Finally, he reached into plaintiff Rossi's pocketbook which was between the two front seats. This search was objected to by Mr. DeOrio and Mr. Honymar, and when they threatened to report Trooper Kowal, he said, "Go ahead." The Trooper refused to give his name and badge number, but Mr. Honymar got his name off his shirt, and Miss Rossi took down the Trooper's car's license plate number. Afterwards, Trooper Kowal departed without issuing a summons.

Complaints were filed that day by the plaintiffs, and an investigation took place in two or three weeks. Trooper Kowal received no reprimand, despite the statement of the investigating officer that he would be reprimanded. Instead, he received a commendation for his law enforcement activity during May and June 1971. (T713-34; T945-49) The frisks and searches of Mr. DeOrio and Mr. Honymar were both illegal as there was no reason to believe them to be armed or dangerous and because the circumstances certainly did not warrant more than a frisk. The search of the glove compartment was valid as it had been consented to by Mr. DeOrio. The consent was withdrawn when Trooper Kowal began to search Miss Rossi's pocketbook. Thus, the search of that pocketbook can be supported only on some ground other than consent. However, the court cannot discern any such other legal basis for the search.

48. On August 19, 1970, plaintiff Christopher Quemore, a college student, was driving on Route 70 with his parents and with his younger brother and the brother's friend. He was driving a converted 1951 Packard ambulance when he was pulled over by State Troopers Gunter and Kriskanda. Trooper Kriskanda ordered everyone to get outside of the vehicle and to stand in front of it with their arms at their sides. He then checked plaintiff Christopher Quemore's license and registration card. Then there was a discussion concerning the fact that the car was registered in the name of a person who co-owned the car. In an authoritative voice, the Trooper asked if he might search the vehicle. Plaintiff Quemore said, after seeking advice from his mother, "Be my guest." Trooper Gunter went to the back of the vehicle, opened the rear doors, and, leaning into the rear of the ambulance, checked inside various compartments within the vehicle, including a search through the family's picnic basket and ice cooler. After this, the Troopers conducted a safety check of the vehicle and both Troopers departed without issuing a summons. (T739-56) Despite the fact that there were two officers present and acting with authority, the court feels that the

Quemores were aware of their right to refuse and decided freely to submit to a search.

49. On May 5, 1971, plaintiff Nicholas Paul, a college student, was driving along Route 1 accompanied by his sister, plaintiff Martha Paul, a high school student, and her friend. Plaintifff Nicholas Paul was proceeding south on Route 1 when he was stopped approximately 10 miles from Princeton by a local police officer from South Brunswick who was later joined by a State Trooper in another car. Mr. Paul got out of the car and showed the local officer his license and registration card. The officer then ordered the other passengers out of the car, over the objection of Miss Paul's friend. Having ordered all three passengers to stand in the front of the car with their hands on the hood, the local officer proceeded to open the door on the passenger side of the car and to search within the glove compartment, under the seat, and behind the front and back seats. He then went to the other side of the car and conducted a similar search. Finally, a summons was issued by the local officer for speeding. The State Trooper merely provided back-up support during the incident. (T759-67)

There is no question but that the search of the vehicle conducted by the local officer was illegal, not being based on probable cause nor consent. However, as the State Trooper did not become involved as back-up support until the incident was under way, the court finds that there was unsufficient proof that the State Trooper knew sufficient facts to be able to judge the legality of the search and, thus, the court will not consider the incident as part of the alleged pattern or practice.

50. On February 22, 1971, Mr. Robert Miller, a writer and former captain in Military Intelligence, was traveling as a passenger with Mr.Mark Goldenberg along Route 1 when they were stopped by State Trooper Zupko. After checking Mr. Goldenberg's license and registration card, Trooper Zupko was issuing a summons for speeding when he was joined by Trooper Bershefski in a second vehicle. Upon issuing the Summons to Mr. Goldenberg, and while he was in the process of explaining the procedures of compliance with the summons to Mr. Goldenberg, Trooper Zupko noticed that the passenger was operating a tape recorder during the discussion. Trooper Zupko asked the passenger Miller if he had any proof of ownership of the tape recorder, which Miller did not. Trooper Zupko then ran an N.C.I.C. check on it, as well as two radios that were in the back seat. The N.C.I.C. checks came back negative. At that point, Trooper Zupko asked to look in the trunk of the car. Mr. Goldenberg

verbally consented when he was informed that if the Trooper believed Mr. Goldenberg to be concealing anything, a warrant would be obtained if he refused. Absent such belief as to concealment, Trooper Zupko later stated he did not believe he had probable cause to search. Both Mr. Goldenberg and Mr. Miller went to the rear of the car while both Troopers thoroughly searched the trunk, including a careful inspection of the contents of a tool box. During this search, both Mr. Goldenberg and Mr. Miller were continually questioned as to which organizations they belonged and where they were going to and from. After searching the trunk, Trooper Zupko went to the front of the car and began to search around the front seat and under the dashboard. This was objected to by both Mr. Goldenberg and Mr. Miller as they felt that they had consented only to a search of the trunk. Nevertheless, Trooper Zupko continued his search, looking under the front seat and into the glove compartment, and opening a suitcase and a knapsack which were in the back of the car. After searching the interior of the car, Trooper Zupko approached Mr. Miller and patted the pockets of his jacket, questioning him as to their contents. This procedure was objected to by Mr. Miller. The two Troopers then departed. (T781-85;T1298-1316)

The search of the trunk was valid by

reason of consent. The threat of a warrant did not vitiate this consent, as the Trooper made it clear that the issuance of a warrant would not be automatic. The search of the passenger compartment was clearly not justified by reason of consent. Nor was there probable cause or any other legal basis for the search. Finally, the frisk of Mr. Miller was not legal as Trooper Zupko had no reasonable belief that Mr. Miller was armed and dangerous, especially considering the presence of Trooper Bershefski.

51. On December 10, 1971, Mr. Evan Roxborough was parked in a rest area on the New Jersey Turnpike when he was approached by State Trooper Hansen. The Trooper checked Mr. Roxborough's license and registration card, and then left, after some brief questioning. As Mr. Roxborough proceeded out of the rest area, the same Trooper stopped him and was joined 30 seconds later by Trooper DiGiandomenico. Trooper DiGiandomenico checked Mr. Roxborough's license and registration card, and then ordered him out of the car. As Mr. Roxborough conformed to a description given to Trooper DiGiandomenico a few minutes earlier by a woman who had just been accosted by a man who exposed himself to her, Trooper DiGiandomenico placed Mr. Roxborough under arrest for open lewdness and indecent exposure. The woman had been allowed to proceed on her way and had left the service area. Trooper Hansen then conducted a 10 to 15 minutes search of Mr. Roxborough's car. The search included looking under the front and back seats, under the dashboard, through clothing in the back of the car, and into the trunk. The Troopers alleged the search turned up marijuana. The alleged discovery terminated the search and resulted in a further charge of disorderly persons against Mr. Roxborough. The woman was subsequently unable to identify Mr. Roxborough as the sex offender, but Mr. Roxborough pleaded guilty to the resultant narcotics charge. (T830-37; T1210-1215)

This search was clearly valid as a search incidental to a valid arrest of Mr. Roxborough insofar as the search extended to areas under the immediate control of Mr. Roxborough, i.e. the passenger compartment. The search of the trunk and other areas not under the immediate control of Mr. Roxborough was justifiable as a search for evidence, a green jacket which the victim testified the man was wearing, which the officer had probable cause to believe was in the vehicle.

52. On April 24, 1969, Mr. Robert Ratner, a writer, was driving along U.S. Route 1 with two passengers when he was stopped by State Trooper Martens because he had cut another vehicle off while

watching a passenger take pictures of a National Guard Armory. Trooper Martens went immediately to the car and requested the driver's license and registration card, as well as identification from the passengers. When one passenger dropped a plastic bag containing what appeared to be marijuana while locating his wallet, Trooper Martens ordered Mr. Ratner and the other passenger out of the car. He ordered all three to stand against the back of the vehicle. After placing the passenger under arrest, the Trooper proceeded to retrieve the marijuana in the plastic bag. Upon noticing the smell of incense in the vehicle, he then looked through the front and back of the car, including shuffling through Mr. Ratner's clothes. He then proceeded to search Mr. Ratner's pockets and the pockets of one of the other passengers. No permission was sought for any search. The search of Mr. Ratner turned up a plastic bag containing hashish. Upon this discovery, Trooper Martens placed Mr. Ratner under arrest for possession of hashish. Mr. Ratner and one passenger ultimately pleaded guilty to disorderly persons charges.

Mr. Ratner's father filed a complaint concerning the incident. A special report thereon was later prepared. No action was taken against Trooper Martens. (T845-56; T1278-93) The retrieval of the bag of marijuana that had

fallen into plain view was a search based on probable cause to believe the vehicle contained contraband. Probable cause was reinforced by the strong odor of incense pervading the passenger compartment and justified the search of that passenger compartment, as well as the search of the pockets of Mr. Ratner and the other passenger. Moreover, the search of the area under the passenger's immediate control, i.e. the back seat, was justified as a search incident to an arrest.

53. On November 21, 1971 Mr. Alan Mankowitz, a poet and college student, was traveling as a passenger with Mr. Jeffrey Denholtz along the Garden State Parkway when they were pulled over by State Trooper Evans. The Trooper opened the door on the passenger side of the car and asked the driver why he had been traveling so slowly in the left lane. He asked both if they were intoxicated or under the influence of drugs. When the driver was unable to produce a registration, the Trooper ordered both people out of the car and frisked the right hand pocket of Mr. Mankowitz's trousers and ordered him to empty the contents. He then frisked the left hand trouser pocket and ordered Mr. Mankowitz to empty the contents of that pocket. Trooper Evans next performed a similar search on Mr. Denholtz. Then he felt around the glove compartment and underneath the seat with his hand. At that point, the

N.C.I.C. check came back in the negative. The Trooper then issued Denholtz a summons for failure to keep to the right and a verbal warning as to the registration. (T891-906; T1397-1414)

The frisks of Mr. Mankowitz and of Mr. Denholtz were justified as being based on a reasonable belief that they were armed and dangerous in light of the circumstances surrounding the stop and the check. The search of the glove compartment and of the area under the front seat was one calculated to lead to the discovery of proof of ownership of the vehicle. Such a search is proper where no registration is produced.

54. On June 9, 1970, plaintiff Benjamin Nechin, then a college student, was driving in a Volkswagen sedan with high-back front seats along Route 21 when he was stopped by State Trooper Bershefski. The Trooper checked Mr. Nechin's license. When Mr. Nechin was unable to produce his registration and while he was looking for his registration card, Trooper Bershefski walked to the passenger side of the car to inspect the inspection sticker. Then the Trooper opened the door, sat down inside and lifted a marijuana seed from the floor. After arresting Mr. Nechin for possession of marijuana, the Trooper searched the car extensively. The search produced articles alleged to be narcotics found in the door pocket, a compartment closed to view by elastic binding. The marijuana possession charge was dropped after Mr. Nechin won a motion to suppress the evidence. Mr. Nechin was also given two summonses, one for driving without the registration and one for driving a vehicle that had not been properly inspected. Mr. Nechin pleaded guilty to both of these. (T907-920; T1250-78) It was a permissible search for proof of ownership which led to the discovery of contraband in plain view, i.e. a marijuana seed on the floor, which, in turn, gave Trooper Bershefski probable cause to arrest Mr. Nechin. The search of the passenger compartment, which produced narcotics in the elastic door pocket, was incident to a valid arrest.

55. On May 28, 1971, Mr. Robert Dean was driving along Route 34 when he was stopped by State Trooper Kowal for a motor vehicle check. After checking his license and registration card, Trooper Kowal ordered Mr. Dean out of the vehicle and commenced a search of the interior of the vehicle as he had seen Mr. Dean make a furtive movement. This movement consisted of quickly moving his hand underneath the seat as if to conceal something. After Mr. Dean got out of the vehicle, Trooper Kowal searched and discovered a red and white cigarette box containing marijuana. Mr. Dean was then arrested for possession of marijuana.

(T955-57) Under the law pertaining to furtive movements, a furtive movement in and of itself does not give rise to probable cause for a search. The movement must be corroborative of some other information which would indicate that the movement was designed to hide something. Thus, this search was an illegal search, being without probable cause and not consented to.

56. On December 16, 1971, Mr. Thomas Pathway, who is caucasian, was driving with Mr. Tyrone Ross, who is black, when they stopped on the roadway in front of the King George Inn. It was about 10 p.m., just prior to the tavern's closing time. While Mr. Ross went to purchase a package of cigarettes, Mr. Pathway was approached by State Trooper Webber and State Trooper Walsh. Trooper Webber testified that his suspicions about the vehicle arose from a number of factors: (1) the automobile was parked in the roadway with its engine running and a man behind the wheel; (2) the tavern was just about to close, and (3) it was unusual to see blacks in this rural part of New Jersey going into a tavern alone. After checking Mr.Pathway's license and registration card, and Mr. Ross' identification when he returned to the car, Trooper Walsh began issuing a summons for stopping in the road. Trooper Webber, meanwhile, began a flashlight search of the car, walking

around to the passenger side of Mr. Pathway's vehicle. Having observed what appeared to be a movie projector on the floor of the front seat and a brown paper bag next to it, Trooper Webber asked if it belonged to Mr. Pathway. When Mr. Pathway stated that he had borrowed it, Trooper Webber asked if Mr. Pathway would mind if he took a look at the projector. Mr. Pathway responded, "No, go ahead." Then the Trooper opened the passenger door, removed the projector and ran an N.C.I.C. check on the serial number, which was negative. He also was able to determine upon close visual inspection that there were film cannisters in the paper bag. After this, Mr. Pathway and Mr. Ross were allowed to proceed, the summons now having been issued. (T1053-57; T1418-29). Clearly, this search was consented to. There is no evidence that this consent was coerced. Certainly, the observation of items in plain view was also proper. Thus, this search was legal.

57. On January 22, 1972, Mr. Alexander Greenwood, a college student, was driving a 1962 Volkswagen bus along Route 518 with Robert Larson, Angela Turri and two other passengers when he saw a police car pass, traveling in the opposite direction. The police car turned about and started to follow the vehicle driven by Mr. Greenwood. After being so followed for approximately three

miles, Mr. Greenwood was pulled over, just outside of Hopewell, for having malfunctioning brake lights. The police car was occupied by State Trooper Volkmann and State Trooper Tool. Mr. Greenwood got out of the vehicle, produced his driver's license, and explained to the Troopers that he did not have the registration card for the vehicle. Trooper Volkmann, thereupon, frisked Mr. Greenwood's pockets, as was his practice when a registration was not produced, and then proceeded to demonstrate to Mr. Greenwood's satisfaction that his taillights were not working. Trooper Volkmann then ordered Trooper Tool to make an N.C.I.C. check on the license plates. Trooper Volkmann next had Mr. Greenwood go to the front of the vehicle and had him remove articles from the convenience shelf. The Trooper then reached into the vehicle and removed a cigar box from Robert Larson's hands, and searched inside of it for the registration. No permission was sought for this search.

Trooper Volkmann then suggested to Mr. Greenwood that Mr. Greenwood look in the rear of the van for something that would corroborate the name that Mr. Greenwood had given Trooper Volkmann as that of the owner. Mr. Greenwood eventually found a construction helmet with the owner's name on it. Trooper Volkmann then opened the rear door and demanded identification of the passengers in the back seat. Then, spotting a duffle bag

and ascertaining that it was the property of Robert Larson, Trooper Volkmann ordered Miss Angela Turri to hand him the bag. The Trooper then searched inside the bag with the consent of Mr. Larson and returned it. At that point, Trooper Tool informed Trooper Volkmann that the N.C.I.C. check had come back negative. Two summonses were issued, one for malfunctioning taillights and another for driving without a registration card. (T1511-50). In light of Mr. Greenwood's failure to produce a registration card, it was reasonable to believe that Mr. Greenwood was armed and dangerous so as to justify a frisk. The search of the convenience shelf, cigar box and the rear of the van was proper as a means of finding proof of ownership and was arguably consented to as well. As to the search of the duffle bag, Mr. Larson, the owner of the bag, consented to that.

58. On October 26, 1970, plaintiff Jeffrey Fogel, an attorney, was stopped on the Garden State Parkway by two State Troopers. After checking Mr. Fogel's license and registration card, the two Troopers conducted a flashlight search of the inside and outside of his vehicle. (T21-22) This was clearly a legal search.

59. Mr. Daniel Lewis, a newspaper columnist, was driving with his son,

plaintiff George Lewis, when he was stopped along Route 46 by a State Trooper for what the Trooper called a "routine check of his license and registration." Mr. Lewis asked why he had been stopped. (He had been pulled over at a merger point and it had been dangerous for him to pull off the road.) The Trooper replied, "Well, we do these things, especially when you have somebody with long hair sitting in the car." No search occurred. (T179-182)

60. In March 1971, plaintiff Albert Porter was stopped on Route 1 in Princeton by a State Trooper. In conducting a flashlight search of the vehicle, the Trooper observed a pipe on the rear deck. Mr. Porter showed the Trooper the tobacco that went with it. The Trooper wanted a closer look, but Mr. Porter responded, "I don't think you have got a right to do that." The Trooper then became angry and issued a summons, which summons was dismissed when the Trooper failed to show at the hearing. No search was conducted. (T196-97) The search was clearly legal insofar as it went on the grounds of consent. Observation of items in plain view is, of course, legal.

61. In the spring of 1970, Mr. Philip Yazbeck, an attorney, was driving along the New Jersey Turnpike when he was stopped by a State Trooper

named Cox near Exit 4. After offering his license and registration, Mr. Yazbeck was asked to open his trunk, which he refused to do. The Trooper then allegedly queried, "Why are you giving me such a hassle?" Yazbeck responded, "Because you don't have a right to look in my trunk. I have not done anything wrong." When Mr. Yazbeck asked whether he had been stopped for his appearance, the Trooper responded that it was because of his appearance and his out-of-state license. (T215-20) However, the defendants were unable to identify the State Trooper named Cox. (T1155-56) Moreover, Mr. Yazbeck testified that to the best of his recollection the Trooper's car had "New Jersey" written on it and that the Trooper was wearing a "Ranger" hat and a tan uniform. As these details were not the truth (T1155-56), the court finds that plaintiffs have failed to prove that this incident involved a New Jersey State Trooper. No search occurred in any event.

62. In Mid-1969, Mr. Leslie Tobin, a businessman, was stopped along the New Jersey Turnpike near Exit 8 by several State Troopers in separate cars. Mr. Tobin got out of his vehicle and locked it. While he was showing one of the Troopers his license and registration card, the other Troopers walked around Mr. Tobin's vehicle looking inside. No summons was issued. (T495-98) Clearly, the observation of items in plain view is proper.

63. On March 28, 1970, Mr. Philip Danzig, an architect, was stopped by a State Trooper at 1 a.m. on the Garden State Parkway. After checking his license and registration card, the Trooper asked Mr. Danzig if he had anything he should not have had within the vehicle. No summons was issued. No search occurred. (T527-31)

64. In the spring of 1970, Mr. Ronald Greenblatt was traveling along the New Jersey Turnpike when he was stopped by a State Trooper just south of Route 18. The Trooper checked Mr. Greenblatt's license and registration. He ordered him to get out of the car and open the trunk. When Mr. Greenblatt got out of the vehicle, and before opening the trunk, he took a piece of paper and a pencil and began writing down the Trooper's name. When he next asked the Trooper for his badge number and opined that such a search was illegal, the Trooper refrained from searching the vehicle, asking only if Mr. Greenblatt had any contraband or drugs. When Mr. Greenblatt said he did not, he was allowed to proceed. No summons was issued. (T1602-03) Had the Trooper gone on to search, the search would have been illegal, as not based on consent or probable cause. However, the search was not consummated.

65. On February 26, 1971, Mr. Gilly

was stopped by Trooper Anthony Kowal for a routine license and registration check. There were five people in the car. Trooper Kowal asked for the license and registration. When Mr. Gilly opened the glove compartment to get the registration, the Trooper observed a clear plastic bag containing a substance believed to be marijuana. Trooper Kowal placed Mr. Gilly under arrest for possession of marijuana, ordered him out of the car, searched him and handcuffed him. The others were also placed under arrest, although they were not handcuffed at that time. After back-up Troopers arrived, Trooper Kowal searched the car extensively, discovering a couple of pipes in the back seat. The subjects were then taken to the Bordentown Station and processed. Each was searched as he was taken into custody, including a search inside pockets. (Kowal Dep. 30-41) These searches were clearly legal. The observation of the bag of marijuana in plain view was clearly proper, and the search of the automobile and the occupants thereof prior to taking them into custody was also proper as an incident to the arrests on the marijuana charge.

66. On March 22, 1972, at about 2 a.m., Timothy Brown and Michael Adrianse (aged 14 and 17 respectively) were picked up by Troopers Hydo and Yanchyshyn on Route 1 between Trenton and Princeton.

The Troopers then advised Mr. Adrianse that he was being issued a summons for hitchhiking. The Troopers advised both of them that they were going to be placed in the troop car, taken to a barracks, and ultimately turned over to their parents. Prior to putting them in the police car, Trooper Yanchyshyn searched the subjects' persons, including ordering them to unroll their bedrolls. Mr. Adrianse was issued a summons for begging rides. The subjects were taken to the Princeton Barracks. Adrianse's parents were called and they ultimately came and picked the two subjects up. (T1670-87; Dep. 84-96) The search of Adrianse's and Brown's persons was clearly proper as an incident to taking them into custody. The search of the bedrolls, which were under their immediate control at the time, was proper, although they were later placed in the trunk.

SUPPLEMENTAL LETTER-OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DECEMBER 29, 1975

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of H. Curtis Meanor
District Judge

311 United States Court House
Newark, N.J. 07101

December 29, 1975

RE: George W. Lewis, et al
v. George F. Kugler, Jr., et al
Civil Action No. 1712-70

Frank Askin, Esq.
Rutgers University - Law School
Constitutional Litigation Clinic
175 University Avenue
Newark, New Jersey, 07102

Paul G. Levy, Esq.
Deputy Attorney General
State House Annex
Trenton, New Jersey, 08625

Gentlemen:

All that remains to be done in this case, in light of the opinion of November 13, 1975, is to assess money damages in favor of those plaintiffs entitled to them.

Damages will be assessed only against named state trooper defendants who participated in illegal searches as previously found. The only trooper defendants subject to a judgment for damages are Trooper Peter Hook, Trooper Russell Hawke and Trooper John Tanner.

Finding No. 1 (set forth in an appendix to the opinion) involved an illegal search by Trooper Peter Hook of a vehicle in which plaintiffs Stuart Ball and Jeffrey Fogel were driver and passenger respectively. There was no illegal search of their persons. Reasonable compensation for the inconvenience, delay and harassment of this search is determined to be $100 for each of these plaintiffs and they may each have judgment against defendant Peter Hook in that amount. The circumstances of this search are such that defendant Peter Hook could not reasonably have believed that he was acting with probable cause to search.

Finding No. 38 involved an illegal search of the vehicle of plaintiff Jesse Berman by defendant Russell Hawke. Russell Hawke so lacked probable cause for this search that he could not reasonably have been under the impression that his conduct was legal. In addition to searching Berman's vehicle, Hawke forced Berman to stand against a police vehicle and threatened him with physical violence. It is determined that the sum of $250 is reasonable compensation for the harassment, delay and inconvenience suffered by Jesse Berman and he may have judgment against defendant Russell Hawke in that amount.

Finding No. 40 concerns an illegal search of the vehicle of plaintiff George Lewis. Defendant John Tanner stopped Lewis, examined his driving credentials, and extensively questioned him. A flashlight search of the vehicle was conducted by Tanner's companion. Without probable cause, Lewis was detained while other troopers arrived, who interrogated him and searched his vehicle. Although it is not apparent that Tanner actually conducted an illegal search, the conclusion is inescapable that he acted in concert with those who did and was instrumental in detaining Mr. Lewis until their arrival. Under the circumstances present, there could be no reasonable belief that the search was with probable cause or that there was justifiable detention of Lewis for longer than reasonably necessary to examine the driver's license and vehicle registration and issue a summons for a minor traffic violation. It is determined that reasonable compensation to Lewis for his harassment, inconvenience and delay during this 45 minute incident is the sum of $150 and he may have judgment in that amount against defendant John Tanner.

The parties shall endeavor to submit a final judgment in conformity with the opinion of November 13, 1975 and this supplemental letter opinion. If the form of the order cannot be agreed upon, the parties shall settle the form of the judgment in court on January 12, 1976.

No costs are allowed any party. Although the plaintiffs did not succeed in establishing their entitlement to injunctive relief, it is apparent that there was just cause for bringing the action as is shown by the award of money damages to some of the plaintiffs and the number of searches found illegal. Since each side to this dispute emerged victorious in some particulars, not to allow costs appears to be a justifiable exercise of discretion.

Very truly yours,

/s/ H. Curtis Meanor
H. Curtis Meanor
U.S.D.J.

HCM:el

FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, JANUARY 14, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GEORGE W. LEWIS, et al.,)
)
Plaintiffs,) Civil Action No. 1712-70
)
v.)
) ORDER AND FINAL JUDGMENT
GEORGE F. KUGLER, JR., et al.,)
)
Defendants.)

The parties hereto having submitted this action to Hon. H. Curtis Meanor, U.S.D.J., for decision on the trial record compiled before the late Hon. Robert Shaw, U.S.D.J., as supplemented by certain depositions and affidavits; and the Court having considered such entire record, it made findings of fact and conclusions of law in its Opinion of November 13, 1975; and the Court having considered the arguments advanced and the pleadings, affidavits and briefs submitted by the parties on cross-motions for reconsideration of the Court's decision, and having heard argument on said cross-motions for reconsideration of the Court's decision, and having heard argument on said cross-motions on December 22, 1975;

It is hereby Ordered on this 14 day of January, 1976, that:

1. Plaintiffs' application for the award of damages as to plaintiffs Joseph De Orio, Richard Honeymar, Rosalie Rossi, Frank St. Clair and Albert Porter is denied;

2. Plaintiffs' motion for reconsideration of the Court's denial of injunctive relief is denied;

3. Plaintiffs' motion to amend the captions of the complaint and supplemental complaint to substitute the names of State Troopers Good, Kowal and Boylan for the "John Doe" named therein or to add such names as party-defendants is denied;

4. Plaintiffs' motion to amend the prayer for relief to specifically seek an award of compensatory and punitive damages is denied;

5. Plaintiffs' motion that this action may be maintained as a class action is denied;

6. Plaintiffs' motion for a hearing, pursuant to R. 201(e) of the Federal Rules of Evidence, as to the propriety of the Court's taking judicial notice of certain matters and the tenor of the matters allegedly noticed is denied, and even if such matters were incorrectly noticed, it is specifically held that such error would have no effect upon the ruling by this Court on plaintiffs' demands for relief;

7. Defendants' motion for reconsideration of the Court's decision to allow compensatory damages to certain plaintiffs is denied;

8. Defendants' motion to give each defendant against whom money damages were requested the option to request a trial by jury as to liability and damages is denied;

9. Plaintiffs' demands for declaratory judgment and injunctive relief are denied;

10. Plaintiffs Stuart Ball and Jeffrey Fogel are each awarded $100 in compensatory damages against defendant Peter Hook;

11. Plaintiff George W. Lewis is awarded $150 in compensatory damages against defendant John Tanner;

12. Plaintiff Jesse Berman is awarded $250 in compensatory damages against defendant Russell Hawke;

13. No costs will be allowed to any party.

/s/ H. Curtis Meanor
H. CURTIS MEANOR
U.S.D.J.

I consent to the form of
the within Order and
Final Judgment

/s/ Frank Askin
FRANK ASKIN
Attorney for Plaintiffs

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants

By /s/ Paul G. Levy
PAUL G. LEVY
Assistant Attorney General

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,
SEPTEMBER 28, 1971

George W. LEWIS et al., Appellants,

v.

George F. KUGLER, Jr., individually and in his official capacity as Attorney General of the State of New Jersey, et al.

No. 71-1227

United States Court of Appeals,
Third Circuit.

Argued June 22, 1971.

Decided Aug. 4, 1971.

As Amended Sept. 28, 1971.

* * *

Frank Askin, Richard H. Chused, Newark, N.J., for appellants.

Fred H. Kumpf, Deputy Atty. Gen. of N.J., Div. of Crim. Justice (George F. Kugler, Jr., Atty. Gen. of N.J., Trenton, on the brief), for appellees.

Before VAN DUSEN and ROSENN, Circuit Judges, and KRAFT, District Judge.

OPINION OF THE COURT

VAN DUSEN, Circuit Judge.

Plaintiffs appeal from a March 11, 1971, order of the United States District Court for the District of New Jersey, 324 F. Supp. 1220, denying plaintiffs' motion for a preliminary injunction and dismissing plaintiffs' complaint.[1]

Plaintiffs, thirty-seven named individuals, filed a complaint under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964) on behalf of themselves and all others similarly situated seeking declaratory and injunctive relief against the defendants. Plaintiffs allege that they "have travelled in private vehicles upon the public toll roads and public highways of the State of New Jersey and * * * have been subjected to arbitrary stops and unreasonable searches of their persons and their vehicles by defendant[s]." Plaintiffs seek pursuant to Fed. R. Civ. P. 23 to represent a class consisting of "persons who travel in private vehicles upon the public toll roads and public highways of the State of New Jersey and who are subject to [a] pattern and practice of halting and unreasonably searching vehicles and travellers." Plaintiffs also seek pursuant to Fed. R. Civ. P. 23(c)(4)(B) to represent a subclass consisting of "persons of highly individualized personal appearance, to [a] pattern and practice of selective halting and unreasonable searching of vehicles and travellers." Plaintiffs characterize members of this subclass as "long-haired highway travelers." Defendants are the Attorney General of the State of New Jersey, the Superintendent of State Police, fourteen named individual New Jersey State Troopers, and all other members of the New Jersey State Police "who have participated in carrying out against the named plaintiffs the pattern and practice of halting and unreasonably searching vehicles and travellers."

The complaint charges that the defendants engage in a "pattern and practice of unreasonable searches of vehicles and travellers carried on without probable cause," resulting in a denial to plaintiffs, the plaintiff class consisting of all travellers, and the plaintiff subclass consisting of all long-haired travelers of their rights to travel and to be free from unreasonable searches. The complaint also charges that this "pattern and practice," which the complaint charges is directed selectively at "long-haired travellers" on the basis of their "highly individualized personal appearance," works a denial of due process, equal protection, freedom of association, and freedom of expression. The plaintiffs find protection for the rights denied in the first, fourth, ninth and fourteenth amendments to the Constitution, as well as in the commerce clause of article I, section 8. The plaintiffs support these allegations with 17 pages in the complaint of detailed factual recitations relating to 25 separate incidents involving contact between plaintiffs and defendants, as well as with 25 affidavits in support of their motion for a preliminary injunction. The complaint seeks, in addition to a declaration that the alleged pattern and practice of selective searches is unconstitutional and an injunction against its continuance, broad equitable relief in the nature of district court approval of a plan to be formulated by certain defendants to cure the alleged deprivations of constitutional rights and to prevent their recurrence. The complaint asks that the plan include published notices that the pattern and practice of unlawful searches is being terminated, official handbills to be given to motorists stopped by the State Police advising them of the injunctive relief and describing how they may report violations of the court's decree, and signs on the rear of State Police vehicles advising that "unreasonable searches are illegal." The complaint also seeks an injunction prohibiting the prosecution of 10 of the named plaintiffs by state officials as a result of the searches of the named plaintiffs and their vehicles described in the complaint.

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[1] Defendants have not appealed from that portion of the March 11, 1971, district court order denying defendants' motion to convene a district court of three judges pursuant to 28 U.S.C. §§ 2281, 2284 (1964).

The district court ordered a hearing on plaintiffs' motion for a preliminary injunction. After hearing the testimony of three of plaintiffs' witnesses regarding incidents of allegedly unlawful searches to which they had been personally subjected, the court ordered a recess, indicating that a decision on defendants' motion to dismiss would be announced after the recess. Following the recess, counsel for plaintiffs made an offer of proof to show what the plaintiffs were prepared to prove further in support of their motions for a preliminary injunction.[2] The court then granted

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[2] Counsel for the plaintiffs made the following offer of proof:

> Now, there are other kinds of witnesses we do plan to produce. For example, I do plan to produce a newspaper reporter who will testify to the fact that he rode around with the State Police on newspaper assignments for several nights about a year ago and witnessed, in the course of about twenty to twenty-four hours of riding with State Police, some twenty-five searches which, as he will describe them, are unconstitutional searches in the course of about three nights,***
>
> * * * * *
>
> I have under subpoena, and he may be in the courtroom now, I am not sure. I asked him to be here; a Mr. ________ the Court Clerk of the Bergen County District Court, who has made public statements quoted in the newspapers to the effect that the State Police have a practice of stopping long-haired drivers on the highways in order to try to find drugs in their cars.
>
> We have some other witnesses who have not themselves been searched. For

(FN 2 continued on next page)

defendants' motion to dismiss the complaint, giving an oral opinion on the legal issues involved, which was supplemented by a written opinion filed March 16, 1971. This appeal followed. It is not disputed on this appeal that the complaint states a federally cognizable cause of action. The issues here are limited to whether the district court should grant relief in the event that the plaintiffs prove the allegations in their complaint.

I.

THE ABSTENTION DOCTRINE

In dismissing the complaint, the district court invoked the abstention doctrine,

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(FN 2 continued)
example, two attorneys from Philadelphia, whom we had planned to produce, who would testify to the notoriety of the practices of the New Jersey State Police among the long-haired community and the impact which this practice and its notoriety have had on the traveling habits of members of the long-haired community.

In addition, your Honor, there is some documentary evidence which we would be prepared to introduce which includes, for example, a number of admissions by State Troopers at various hearings as to their policy or their practice of searching out long-haired travelers.

N.T. 44-46.

holding that principles of comity required that plaintiffs' claim first be presented to the New Jersey state courts. This is an action brought under the federal Civil Rights Act, raising federal constitutional claims and prior resort to the state courts is not required.[3] Federal courts faced with federal constitutional claims should abstain only when there is an unresolved question of state law which only the state courts can authoritatively construe.[4] Abstention in such cases permits state court decisions which may render unnecessary the resolution of constitutional issues, and thereby avoid any possible strain on our system of federalism.[5] There is no uncertain state law issue in this case.

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[3] *See, e.g.*, Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968); Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967); Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967); McNeese v. Board of Education, 373 U.S. 668, 671-672, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Burnett v. Short, 441 F.2d 405 (5th Cir. 1971).

[4] *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433, 437-439, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Fornaris v. Ridge Tool Co., 400 U.S. 41, 43, 91 S.Ct. 156, 27 L. Ed.2d 174 (1970); Reetz v. Bozanich, 397 U.S. 82, 86-87, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); Harman v. Forssenius; 380 U.S. 528, 534, 85 S. Ct. 1177 14 L. Ed. 2d 50 (1965); Harrison v. NAACP, 360 U.S. 167, 176-177, 79 S. Ct. 1025, 3 L. Ed. 2d 1152 (1959); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 79 S. Ct. 455, 3 L. Ed. 2d 562 (1959).

The Supreme Court considered the availability of state remedies in the context of actions brought under 42 U.S.C. § 1983 in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and stated:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.
>
> 365 U.S. at 183, 81 S.Ct. at 482.

In discussing the expansion of federal judicial power resulting from the enactment of § 1983 in the Civil Rights Act of 1871, the Court stated in Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967):

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[5] See, e.g., Reetz v. Bozanich, 397 U.S. 82, 86-87, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); Harman v. Forssenius, 380 U.S. 528, 534 & n. 7, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965); Railroad Com'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

> Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have solemn responsibility equally with the federal courts, " * * * to guard, enforce, and protect every right granted or secured by the constitution of the United States * * *," Robb v. Connolly, 111 U.S. 624, 637, 4 S.Ct. 544, 28 L.Ed. 542. "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." [Citations omitted.]
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> 389 U.S. at 248, 88 S.Ct. at 395.

This principle has not been altered by the recent decisions of the Supreme Court in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971), and Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971). These cases deal with the circumstances under which federal courts may appropriately intervene in pending state criminal prosecutions,[6] and are pertinent to this case only insofar as the complaint seeks relief in the nature of an injunction against state criminal proceedings. They are not applicable to situations

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[6] All of these cases, with the exception of Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), deal with the circumstances under which a federal court may appropriately enjoin a pending state criminal prosecution. Samuels dealt with the circumstances under which a federal court may appropriately inject itself into a pending state criminal prosecution by issuing a declaratory judgment pursuant to the Federal Declaratory Judgment Act of 1934, 28 U.S.C. § 2201 (1964), adjudicating the validity or invalidity of the state statute upon which the pending criminal prosecution is based. The decisions in these cases, which turn on established principles of equity, focus on Federal court intervention in pending state court proceedings. These decisions are inapplicable to the instant case, except insofar as the instant complaint seeks an injunction against pending state criminal proceedings and declaratory judgments which would interfere with pending state criminal proceedings, because the bulk of the instant complaint does not seek to interfere with pending state criminal proceedings. The request for relief against pending state criminal proceedings relates to only 10 of the 37 named plaintiffs, and those 10 seek other relief as well.

where no prosecution is pending in state courts at the time a federal proceeding is begun,[7] and they do not alter the abstention doctrine insofar as it relates to federal Civil Rights Act claims which do not seek relief that entails intervention in state criminal proceedings. We therefore hold that it was improper for the district court to invoke the abstention doctrine to dismiss any portions of the complaint other than those seeking an injunction against pending state criminal prosecutions and declaratory relief involving pending state criminal prosecutions.

II.

THE STATE CRIMINAL PROCEEDINGS

In view of Younger v. Harris, supra, and Samuels v. Mackell, supra, insofar as the complaint sought an injunction against the state criminal proceedings pending against 10 of the named plaintiffs, and insofar as it sought a declaratory judgment holding unconstitutional the searches and seizures forming the basis of the state criminal proceedings pending against the ten, dismissal was proper.[8]

The Court held in Younger that the possible unconstitutionality of a statute "on

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[8] This part of the complaint requests:

> That preliminary and permanent injunctions issue prohibiting the defendant, Attorney General Kugler, and all his agents, servants, employees, and all others under his control or in concert with him, from prosecuting

its face" does not justify an injunction against attempts to enforce it, absent a showing of bad faith, harassment, or other unusual circumstances sufficient to establish irreparable injury and therefore call for equitable relief. While this case does not pose a challenge to the constitutionality of a state statute, the equitable principle of Younger is nonetheless applicable, for the focus of Younger is on intervention in pending state criminal proceedings, and that is precisely what plaintiffs seek in part in this case. Plaintiffs have made no showing, and have not alleged or offered to prove facts which if true would establish, that the pending state criminal proceedings were brought in bad faith, were brought merely to harass plaintiffs, or are being prosecuted under circumstances establishing "the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that ha[s] always been considered sufficient to justify federal intervention." 401 U.S. at 48, 91 S.Ct. at 752. While plaintiffs allege that the searches and seizures forming the basis of the state criminal proceedings were conducted in bad faith, that allegation, if true, would not establish the irreparable injury necessary to justify federal court intervention to protect plaintiffs' rights. The plaintiffs allege police misconduct, but an injunction against pending state criminal proceedings would operate against the prosecutorial authorities, and there is no allegation that they have either fostered or taken part in the alleged misconduct. The facts alleged here are quite different from those alleged in Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), where the plaintiffs offered to prove that the prosecutorial authorities threatened to enforce statutes against the plaintiffs without any expectation of securing valid convictions, that despite a summary vacation of search and

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(FN 8 continued)
any complaint resulting from the searches of said plaintiffs and their vehicles as detailed in the foregoing complaint against the following named plaintiffs: Charles W. Jaeger, Ellen Urman, Edward Piwowarski, Christopher Paul Barone, Alan P. DeMott, Bruce J. Nugent, Alan C. Morrill, Paul Schneider, Benjamin Nechin, and Alan H. Gordon, in any of the following criminal proceedings: grand jury proceedings, trial proceedings, and any other criminal proceedings instituted against the above named plaintiffs. The district court treated this paragraph as a request for injunctive relief against future prosecutions of the 17 named plaintiffs who were not subject to pending state criminal proceedings at the time the suit was instituted. Such relief must be denied, not only because the complaint and offers of proof do not make out a case for such injunctive relief, for the reasons detailed in Part II of this opinion, but also because the 17 against whom prosecutions apparently are not threatened are not appropriate plaintiffs in an action for such injunctive relief. See Younger v. Harris, 401 U.S. 37, 41-42, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

arrest warrants by a state judge for lack of probable cause the prosecutorial authorities were continuing to threaten new indictments and prosecutions based on the evidence ordered suppressed by the state judge, and that the prosecutorial authorities were engaging in a plan of arrests, seizures, and threats of prosecution for the sole purpose of harassing plaintiffs in order to discourage them from attempting to vindicate the constitutional rights of black citizens of Louisiana. In this case, as in Younger, there is no allegation that the prosecutions are brought in bad faith, or are only part of a series of repeated prosecutions to which the 10 plaintiffs being prosecuted will be subjected. Here the 10 plaintiffs being prosecuted will have an opportunity to raise their constitutional claims in the state criminal proceedings, and there is no indication that defense of the state criminal prosecution will not assure adequate vindication of their constitutional rights.[9] The injury that they face is solely "that incidental to every criminal proceeding brought lawfully and in good faith," and

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[9] See Younger v. Harris, 401 U.S. 37, 48-49, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); cf. Dombrowski v. Pfister, 380 U.S. 479, 485-486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

they are therefore not entitled to equitable relief.[10]

Since the equitable principles of Samuels are applicable to the facts of this case, and since an injunction against the state criminal proceedings pending against the above-mentioned 10 plaintiffs is barred by those same equitable principles, relief by way of a declaratory judgment that the searches and seizures forming the basis of the state criminal proceedings against the 10 are unconstitutional should also be denied. The Court in Samuels held that "relief by way of declaratory judgment should [be] denied without consideration of the merits." 401 U.S. at 66, 91 S.Ct. at 768. This case differs from Samuels, however, in that the 10 plaintiffs being prosecuted, in addition to seeking relief against the prosecutorial authorities, also seek relief against the New Jersey State Troopers. As we have noted, that relief is not barred by the Younger and Samuels line of cases. Accordingly, the district court may consider the merits of the constitutional claims advanced by the 10 plaintiffs being prosecuted, as a part of its consideration of all of the evidence offered by plaintiffs to prove a pattern and practice of unlawful police misconduct, but the district court should not enter a declaratory judgment with respect to the constitutionality of the searches and seizures forming the basis of the state criminal proceedings against the 10. The Younger and Samuels line of cases does not bar relief with respect to the 17 other named plaintiffs, against whom state criminal prosecutions are not pending. We need express no opinion on the propriety of declaratory judgments with respect to the 17 other named plaintiffs on the present record.

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[10] See Younger v. Harris, 401 U.S. 37, 49, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Douglas v. City of Jeannette, Pa., 319 U.S. 157, 164, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); Watson v. Buck, 313 U.S. 387, 400, 61 S.Ct. 962, 85 L.Ed. 1416 (1941); Beal v. Missouri Pac. R.R., 312 U.S. 45, 49, 61 S.Ct. 418, 85 L.Ed. 577 (1941).

III.

THE PROBLEM OF REMEDY

The district court appears to have based its dismissal in part upon the belief that, even if plaintiffs are able to prove that the New Jersey State Troopers are selectively subjecting "long-haired highway travelers" to a pattern and practice of unconstitutional searches and seizures, it would be either improper to grant relief, or impossible to fashion appropriate relief. The district court stated:

> As to the class of persons which plaintiffs purport to represent, the injunctive relief sought here which would restrain activity of the New Jersey State Police is not only difficult to conceive but almost impossible to fashion effectively.

> * * * [Such relief] would be a most unwarranted intrusion by a federal court upon the functions of the executive branch of the state government and the inhibiting effect on law enforcement and police morale would, in the opinion of this Court, be more disastrous to the public interest than the inhibiting effect of which plaintiffs complain.

If the plaintiffs can establish that they are subjected to a deliberate pattern and practice of constitutional violations by the New Jersey State Troopers, we believe that they are entitled to appropriate injunctive relief. Persons who can establish that they are being denied their constitutional rights are en- [sic] entitled to relief,[11] and it can no longer be seriously contended that an action for money damages will serve adequately to remedy unconstitutional searches and seizures.[12] The United

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[11] See, e.g., Henry v. Greenville Airport Comm'n, 284 F.2d 631, 633 (4th Cir. 1960); Clemons v. Board of Education, 228 F.2d 853, 857 (6th Cir.), cert. denied, 350 U.S. 1006, 76 S.Ct. 651, 100 L.Ed. 868 (1956).

[12] The United States Court of Appeals for the Seventh Circuit has noted that where, as in this case, it is alleged that first amendment rights have been chilled as a result of government action, a "presumption of irreparable harm is manifest." Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969); see Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

States Court of Appeals for the Fourth Circuit, in a unanimous en banc decision, has noted that neither the personal assets of police officers nor the nominal bonds they furnish afford a genuine hope of redress, that there is no provision for compensation from public funds, and that the wrongs inflicted by unconstitutional police conduct are not readily measurable in monetary terms. Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966) (en banc). The Supreme Court has characterized the prospect of pecuniary redress for the harm suffered as a result of unconstitutional searches and seizures as "worthless and futile." Mapp v. Ohio, 367 U.S. 643, 652, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In addition, history has demonstrated that the possibility of a judgment for money damages does not serve as an effective deterrent to future unconstitutional police conduct.[13]

The Supreme Court approved the use of an injunction as a remedy for unconstitutional police conduct in Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).[14] The Fourth Circuit approved the use of an

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[13] See, e.g., Mapp v. Ohio, 367 U.S. 643, 651-652, 670, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Irvine v. California, 347 U.S. 128, 137, 74 S.Ct. 381, 98 L.Ed. 561 (1954); Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966) (en banc).

[14] This decision affirmed with modifications 101 F.2d 774 (3d Cir. 1939), which had affirmed 25 F. Supp. 127 (D.N.J. 1938).

injunction as a remedy for unconstitutional searches and seizures by police in Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc), a decision which has been cited with approval by the Court of Appeals for the District of Columbia Circuit in Gomez v. Layton, 129 U.S. App. D.C. 289, 394 F.2d 764 (1968), and by the Court of Appeals for the Seventh Circuit in Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969). In addition, the United States District Courts have often used injunctive relief against unconstitutional police conduct,[15] and injunctive relief against

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[15] See cases cited in Note, The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 Yale L.J. 143, 146 n.17 (1968), and in Lankford v. Gelston, 364 F.2d 197, 201 n. 5 (4th Cir. 1966) (en banc). Quite recently, on September 4, 1970, the United States District Court for the Eastern District of Pennsylvania, in Council of Organization on Philadelphia Police Accountability v. Tate, Civ. No. 70-2430 (E.D. Pa.), issued a temporary restraining order against unconstitutional searches and seizures by police. That order of September 4, 1970, provided in relevant part:

> The defendant police officials and all police officers in Philadelphia having notice hereof are restrained and enjoined until further hearing in this matter from violating the rights of the plaintiffs or any member of the class of plaintiffs guaranteed to them under the Constitution of the

(FN 15 continued on next page)

state officials has frequently been imaginatively fashioned by the federal courts

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(FN 15 continued)

United States or directly and indirectly causing any such violation and particularly are restrained and enjoined from entering without warrant or probable cause the homes of plaintiffs and members of the class of plaintiffs or harassing or arresting said class members in violation of their rights as citizens. Nothing in this order shall be construed as limiting in any way the authority of the police to enforce the law in a lawful manner and to exercise and defend their own rights as citizens. See N.T. 217-19.

This order was issued as a precautionary measure at a time when there was considerable tension between the plaintiff class and the Philadelphia Police Department, and there was genuine reason for concern that the existing tension might dramatically escalate. See N.T. 218. After the issuance of this order, the feared escalation in tensions did not materialize. For a more comprehensive order of a similar nature, see the preliminary injunction of July 10, 1965, in Hicks v. Knight, Civ. No. 15,727 (E.D. La.), 10 Race Rel. L. Rep. 1504, 1505.

in school desegregation cases.[16]

The district court's concern about inhibiting lawful law enforcement is of course a proper concern. A federal court should avoid unnecessarily dampening the vigor of a police department by becoming too deeply involved in the department's daily operations, both because of the vital public interests at stake, and because of the danger that the court could become enmeshed in endless time-consuming bickering and controversy. Should the plaintiffs establish that a substantial threat of constitutional violations exists, either directed by or tolerated by officials of the New Jersey State Troopers or the State of New Jersey, one means of remedying the situation available to the district court would be to direct appropriate orders to the responsible officials, with a view to having the situation corrected by them internally, by altering the police disciplinary procedure or otherwise. This is only one of numerous possible alternatives,[17] and whether it would be necessary or adequate to protect plaintiffs' rights of course depends upon the facts. Like any court of equity, the district court has very broad power to fashion a remedy appropriate to deal with the factual situation before the court.[18] Two considerations must be borne uppermost in mind: first,

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[16] See cases cited in Note, The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 Yale L.J. 143, 148 n.20, 149 n.25 (1968).

[17] For example, should the court find that, unknown to their superiors, deprivations of constitutional rights are perpetrated by only a few of the defendants, it might be possible to fashion a remedial order only with respect to those defendants.

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[18] This broad power to fashion appropriate remedies extends from the power to issue injunctions against individual offenders and to appoint observers and special masters, to the power, in extreme cases, to appoint receivers. See, e.g., Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc); Knight v. Board of Education, 48 F.R.D. 115 (E.D.N.Y. 1969); Murray v. Madigan, Civ. No. 51398 (N.D. Cal., filed May 29, 1969) (observers appointed to report to court events at mass arrest facilities); Kapral v. Jepson, 271 F. Supp. 74 (D. Conn. 1967); Turner v. Goolsby, 255 F. Supp. 724 (S.D. Ga. 1965) (three-judge court) (public school system placed in receivership); Butterworth v. Dempsey, 237 F. Supp. 302 (D. Conn. 1965); United States v. Manning, 215 F. Supp. 272, 292-294 (W.D. La. 1963). See generally Brown v. City of Meridian, 356 F.2d 602, 605 (5th Cir. 1966); Lefton v. City of Hattiesburg, Miss., 333 F.2d 280, 284 (5th Cir. 1964); Note, Monitors: A New Equitable Remedy?, 70 Yale L.J. 103 (1960).

deprivations of constitutional rights must be stopped promptly; and second, unnecessary encroachment upon state and local government functions must be avoided.[19] We are confident that the district court, which is free to draw upon its wide experience, history, and the recommendation of responsible parties,[20] can fashion an appropriate remedy that will protect the constitutional rights of citizens, while preserving the integrity and efficiency of the law enforcement authorities.

If the plaintiffs establish that a substantial threat of directed or tolerated constitutional violations exists, the "inhibiting effect on * * * police morale" (see page 1350 above) is not the sole consideration for the court. As Mr. Justice Brandeis so eloquently observed 43 years ago in his dissenting opinion[21] in Olmstead v. United States, 277 U.S. 438, 471, 48 S.Ct. 564, 72 L.Ed. 944 (1928), and as this court recently noted in In re Grand Jury Proceedings No. 71-1088 (3rd Cir., filed May 28, 1971) (Slip opinion at 35):

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[19] For a thorough discussion of the problem presented by this case, as well as potential solutions, see Note, The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 Yale L.J. 143 (1968), and Comment, Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 104 (1970).

[20] In Goode v. Tate, Civ. No. 70- 491 (E.D. Pa.), a case involving an alleged pattern of constitutional deprivations by police, the United States District Court for the Eastern District of Pennsylvania received suggestions regarding an appropriate remedy from such non-profit civic groups as the Greater Philadelphia Movement and the Philadelphia Bar Association. We express no opinion on the merits of Goode.

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.
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> 277 U.S. at 485, 48 S.Ct. at 575.

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[21] This dissenting opinion was cited with approval by the Court in Elkins v. United States, 364 U.S. 206, 222-223, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

We need not detail here the significance of unconstitutional police conduct or the importance to social stability and police morale of public respect for law enforcement authorities, for these matters have been adequately dealt with elsewhere.[22]

For the reasons stated above, the order of March 11, 1971, will be vacated, and this case will be remanded to the district court for proceedings consistent with this opinion.[23] The plaintiffs should be given a prompt hearing on their motion for a preliminary injunction.[24]

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[22] See, e.g., Brinegar v. United States, 338 U.S. 160, 180-181, 69 S.Ct. 1302, 93 L. Ed. 1879 (1949) (Jackson, J., dissenting); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc); Report of the National Advisory Comm'n on Civil Disorders, 11, 143-44, 299-307 (1968); President's Comm'n on Law Enforcement and Administration of Justice: Task Force Report: The Police, 178-89 (1967); Edwards, Order and Civil Liberties: A Complex Role for the Police, 64 Mich. L. Rev. 47 (1965).

[23] On this appeal, it is not necessary to determine whether this case should be permitted to proceed on behalf of, and/or against, members of a class. However, it is noted that the Courts of Appeals have approved flexible methods of decisions on class action issues by the district courts. See, e.g., Ernst & Ernst v. United States District Court, 439 F.2d 1288, 1293 (5th Cir. 1971). We reiterate that there is a strong policy in favor of articulation of findings and reasons for decision on class action issues. Interpace Corp v. City of Philadelphia, 438 F.2d 401, 404 (3d Cir. 1971).

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[24] Even the brief testimony of plaintiffs' witnesses which the district court was willing to hear makes clear that some plaintiffs were entitled to relief in the absence of evidence offered by defendants. See, for example, testimony of plaintiff Berman at N.T. 89a-89a. A plaintiff is entitled to the relief required by the evidence "even if the party has not demanded such relief in his pleadings." See F. R. Civ. P. 54(c); *see also* Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 925-926 (2d Cir. 1968), where the court said:

> " * * * [A] complaint should not be dismissed for legal insufficiency except where there is a failure to state a claim on which *some* relief, not limited by the request in the complaint, can be granted."

See also 6 Moore's Federal Practice § 54.60 (2d Ed. 1966, including 1970 Supplement at p. 86).

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AUGUST 4, 1971

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-1227

GEORGE W. LEWIS, SALLY ANN RIDENOUR, DAVID RIDENOUR, PETER BRADY, WAYNE R. BARRETT, DANIEL AUCIELLO, JESSE BERMAN, RUTH ELIZABETH QUEMORE, WILLIAM JAMES QUEMORE, JR., CHRISTOPHER ROBERTS QUEMORE, STUART BALL, JEFFREY E. FOGEL, CHARLES W. JAEGER, ELLEN URMAN, EDWARD PIWOWARSKI, KENNETH RENFRO, STANLEY SACHAROFF, CHRISTOPHER PAUL BARONE, RANDY WARSAGER, WARREN HERGENHAN, JR., ERIC MICHAEL BLUMBERG, JOHN HENRY BROWNE, RONALD LEE ROSEMAN, ROBERT McMASTERS, DAVID TRAIN, JOSEPH A. VACCARO, ALAN P. DeMOTT, ALLEN M. RESSLER, PETER GILMORE, MARK GILMORE, ALAN C. MORRILL, BRUCE J. NUGENT, PAUL SCHNEIDER, BENJAMIN NECHIN, ALAN H. GORDON, EILEEN GRUNLOH, RONALD L. GRUNLOH on behalf of themselves and all other [sic] similarly situated,

Appellants

vs.

GEORGE F. KUGLER, JR., individually and in his official capacity as Attorney General of the State of

New Jersey; DAVID B. KELLY, individually and in his official capacity of Superintendent of State Police of the State of New Jersey; New Jersey State Police Troopers BOYCE, FINK, LENSI, PITKO, FREDERICK MARTENS, RINKER, RITTGER, RUSSELL HAWKE, JAMES CONOVER, TANNEN, THOMS, LAIRD, HOOK, and CARABELLI, individually and in their official capacities and as representatives of all others similarly situated; and New Jersey State Troopers "JOHN DOE" individually and in their official capacities and as representatives of unknown New Jersey State Police Troopers

[Respondents]

(D.C. Civil Action No. 1712-70)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Present: VAN DUSEN and ROSENN, Circuit Judges, and KRAFT, District Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 11, 1971, be, and the same is hereby vacated, and the cause remanded for proceedings consistent with the opinion of

this Court. The plaintiffs should be given a prompt hearing on their motion for a preliminary injunction.

ATTEST:

THOMAS F. QUINN,

Clerk

August 4, 1971

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, MARCH 16, 1971

George W. LEWIS et al., Plaintiffs,

v.

George F. KUGLER, Jr., individually and in his official capacity as Attorney General of the State of New Jersey, et al., Defendants.

Civ. No. 1712-70.

United States District Court, D. New Jersey.

March 16, 1971.

* * *

Frank Askin, Richard Chused, Newark, N.J., John Zwerling, Arlington, Va., for plaintiffs.

George F. Kugler, Jr., Atty. Gen. of N.J., Trenton, N.J., by Richard B. McGlynn, George Dougherty, Deputy Attys. Gen., for defendants.

SHAW, District Judge.

The Court has determined that it should edit and supplement oral opinion dictated on the record at the conclusion of hearing in this matter and does so as follows:

Plaintiffs seek a declaratory judgment and injunctive relief alleging deprivation of civil rights secured by the First, Fourth and Fourteenth Amendments to the United States Constitution. There is also a reference to the Ninth Amendment and the Commerce Clause, Article I, Section 8.

The matter came on for hearing on an order to show cause why a preliminary injunction should not issue and on motion of defendants to dismiss the action. It was also argued in defendants' brief that a three-judge court should be convened pursuant to the provisions of 28 U.S.C. §2281. The Court heard arguments of counsel on the application for injunctive relief and on the motion to dismiss but, before reaching a decision, permitted plaintiffs to present testimony of three witnesses who, plaintiffs' counsel stated, represented a fair sampling of the testimony of a large number of witnesses that plaintiffs had available.

The constitutionality of a state statute is not challenged and the facts presented by the allegations of plaintiffs do not present a situation that requires decision by a three-judge statutory court pursuant to 28 U.S.C. § 2281.

Plaintiffs seek to enjoin what they consider to be enforcement of an official police policy of state-wide application which is alleged to violate constitutional rights. The complaint must be dismissed for reasons hereinafter stated.

It is alleged in the complaint that this is a class action by plaintiffs consisting

> " * * * of persons of highly individualized personal appearance who travel in private vehicles upon the public toll roads and public highways of the State of New Jersey and who are subject, solely because of said highly individualized personal appearance, to the pattern and practice of selective halting and unreasonable searching of vehicles and travellers.
>
> * * * The said sub-class of persons of highly individualized personal appearance includes, but is not limited to, persons wearing beards, unusual hair styles, or unorthodox clothing or who in some other way are visually distinguishable from the average user of the said roads (said sub-class hereinafter referred to as 'longhaired travellers')."

Observation of the witnesses who testified and others seated in the courtroom ready to testify as plaintiffs left no doubt of the "highly individualized" appearance both in the matter of dress, extensive covering of hair over the face with many and varied bizarre forms of trim and lengthy tresses of hair on the head streaming and curling down the back. Whether deliberately designed to attract attention or not, the appearances were, to say the least, "eye catching." The reference in the complaint to the "longhaired travellers" was most apt. Exhibit A attached to the complaint depicts the more moderate individualized appearances

as distinguished from those which the Court observed in the courtroom.

The principal thrust of the action is that individuals such as plaintiffs and others of like appearance are stopped frequently by New Jersey State Police while traveling on public highways in the State of New Jersey. N.J.S.A. 39:3-29 authorizes police officers of the state to stop vehicles and demand that the operator exhibit his drivers license and registration. The constitutionality of this statute is not challenged. It is contended, however, that the New Jersey State Police singled out persons such as plaintiffs and other persons of like appearance for more frequent surveillance than that directed to other travelers and that illegal searches of the vehicles operated were routinely conducted. Some of the searches were unproductive, but it was conceded that nine produced contraband mostly of marijuana and that nine of the plaintiffs are presently subjects of criminal prosecution in the state courts.

As to the remaining plaintiffs, it does not appear that they have been subjected to criminal prosecution or even threatened with it. But they deplore the inhibiting or "chilling effect" upon their future activities. The Supreme Court in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), observed, "But this sort of 'chilling effect' * * * should not by itself justify federal intervention." If others in the alleged class who have not been prosecuted or threatened with prosecution are inhibited in their activities by fear of apprehension for violations of law, the result seems to be consistent with effective observance of the law. Valid criminal statutes would serve little purpose unless they had some inhibiting effect. " * * * [P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs. * * *" Younger v. Harris, supra, for federal court interference with state law enforcement policy pursuant to valid criminal statutes.

Those plaintiffs who are the subjects of pending prosecution in state courts have an adequate forum for the protection of their constitutional rights and those who have not been subjected to prosecution or threatened with it have no valid claim to federal court relief which will calm their inhibitions.

The increasing prevalence of the mistaken notion that constitutional rights in cases where state courts have jurisdiction will receive more just and competent consideration in a federal district court than could be expected in a state court should be discouraged. If we ignore the principle of comity and the role of federalism, the burden of the volume of litigation that will be thrust upon the federal court in bypassing the state court will become increasingly great. Of course, where it has been demonstrated that a state court will not protect and enforce federally secured constitutional rights, relief is then and should be available in the federal court. But such is not the situation in this case where counsel for plaintiffs con-

ceded in oral argument that plaintiffs had selected the federal court merely because it was their preference to proceed here. There is no contention that the relief sought here would not be available in a New Jersey state court.

It is now clear from the decision of the United States Supreme Court in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971), that a federal court should not interfere with state criminal prosecutions except upon a showing of "extraordinary circumstances where the danger of irreparable loss [is] both great and immediate."[1] Where injunctive relief would be impermissible, declaratory relief should ordinarily be denied.

> Ordinarily * * * the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction. Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed. 2d 688 (1971).

The fact that there are a number of

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[1] See Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927 (1929) and Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Cited with approval by the Supreme Court in Younger.

plaintiffs against whom no criminal prosecutions are pending does not afford any ground for relief in this court based on allegations of anticipated future activities by the New Jersey State Police. Here again in the absence of a showing of irreparable injury the federal district court should not interfere with state law enforcement policy. See Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971). Hence where a number of plaintiffs are joined some of whom have criminal prosecutions pending against them and some of whom do not, the non-intervention principle enunciated in Younger applies.

Counsel for plaintiffs stressed the injury caused by alleged illegal searches. A hearing on the legality of these searches (which produced the contraband) while state prosecution is pending would be a most unwarranted interference with orderly procedure in the state court prosecutions. State courts have the obligation and equal competence with federal courts to enforce rights secured by the Fourth Amendment to the United States Constitution and in appropriate cases in this state have done so from time to time. Insofar as plaintiffs subject to state prosecution are aggrieved with what they conceive to be unlawful searches and seizures, there is an available remedy in the state court on motion to suppress evidence.

Searches of vehicles alleged to have been made in violation of the Fourth Amendment were emphasized in oral argument with the suggestion that the alleged illegal searches made and to be anticipated were indicative

of bad faith on the part of the New Jersey State Police and deliberate harassment by them of the so-called longhaired travelers. The invitation extended to the Court was to hear the testimony of 25 to 35 witnesses and to decide how many of the searches were made without probable cause. This Court feels that if any one of the plaintiffs has been aggrieved by a search conducted in violation of the Fourth Amendment to the United States Constitution, he has an adequate remedy at law and that the broad equitable injunctive relief sought in this court is not appropriate.

What constitutes an unreasonable search and seizure under the Fourth Amendment is a question that must be resolved in the light of the totality of circumstances in each case. Of course the "individualized" appearance of a person does not of itself justify the conclusion by a police officer that such person has probably committed or is likely to commit a crime. But in the matter of the likely possession and use of narcotic drugs an experienced eye may note significant facial expressions, conduct and manner of speech from which reasonable inferences may be drawn. Also, a police officer who has had extensive training and experience in law enforcement may, with sound reason derived from that training and experience, direct more attention in the performance of his police duties to the activities of some persons than to others. There is nothing unreasonable in particularized surveillance of certain types of persons among whom a police officer, by virtue of his experience, has found valid reason to believe the possession and use of narcotic drugs is more prevalent than among other types of persons.

What may have been unreasonable surveillance before the plague of addiction to narcotics beset so many groups in our society must be considered in a different context when the need to control illegal transportation, possession and use of narcotics is so critically needed. Reasonable cause for the probable belief that a crime has been committed or is about to be committed is all that is required to justify a search and seizure under the Fourth Amendment and each case must be tested on its own facts. Since plaintiffs subjected to prosecution because of contraband in their automobiles have an adequate forum in the state court to test the legality of any search and seizure, this Court should not burden itself with a hearing in each case leading to an opinion to be superimposed upon an orderly state court prosecution.

As to the class of persons who plaintiffs purport to represent, the injunctive relief sought here which would restrain activity of the New Jersey State Police is not only difficult to conceive but almost impossible to fashion effectively. An enforceable order directed to future police activity would necessarily set forth in specific detail the extent, mode and manner of highway patrol. It certainly would not be appropriate to restrain New Jersey State Police from stopping automobiles merely because they were occupied by the so-called long-haired travelers as distinguished from other citizens. Nor would it be appropriate for a federal court to undertake to delineate the specific kind of conduct in which an officer of the New Jersey State Police could engage in the performance of his official duties. Here again such a course of action would be a most unwarranted intrusion by a federal court upon the functions of the executive branch of the state government and the inhibiting effect on law enforcement and police morale would, in the opinion of this Court, be more disastrous to the public interest than the inhibiting effect of which plaintiffs complain.

The application to convene a three-judge court is denied; the motion for a preliminary injunction is denied; and the complaint of plaintiffs is dismissed without prejudice and without costs.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, MARCH 11, 1971

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY
(Filed March 11, 1971)

GEORGE W. LEWIS, et als., [sic] :
on behalf of themselves and all
others similarly situated, :

Plaintiffs, : Civil Action No. 1712-70

vs. :

GEORGE F. KUGLER, JR., et als., :
[sic] individually and in their
official capacities and as rep- :
resentatives of all others
similarly situated, :

Defendants. :

ORDER

This cause having come before the Court on March 9, 1971, on plaintiffs' motion for a preliminary injunction and on defendants' motions to dismiss the complaint and/or in the alternative for the convening of a three-judge court, and the Court having considered the pleadings, briefs, and affidavits filed herein, and having heard the oral argument of counsel for the respective parties, and having heard the testimony of the first three witnesses offered by plaintiffs, it is ordered that:

1) Defendants' motion for convening of a three judge court is denied;

2) Plaintiffs' motion for a preliminary injunction is denied;

3) Defendants [sic] motion to dismiss is granted without prejudice and without costs on the ground that plaintiffs have failed to pursue available state judicial remedies.

ROBERT SHAW

U.S.D.J.

I consent to the form
of the within order.

/s/ Frank Askin
Attorney for Plaintiffs

s [George T. Dougherty]
Attorney for Defendants